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In The

Supreme Court of the United States

OFFICE OF THE CLERK

STATE OF NORTH DAKOTA, THROUGH THE NORTH DAKOTA DEPARTMENT OF HEALTH, AN AGENCY OF THE STATE OF NORTH DAKOTA; JOHN HOEVEN, GOVERNOR; WAYNE STENEHJEM, NORTH DAKOTA ATTORNEY GENERAL, EX REL. STATE OF NORTH DAKOTA; NORTH DAKOTA DEPARTMENT OF HEALTH,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, A FEDERAL AGENCY; GREGG F. MARTIN, DIVISION COMMANDER, NW DIVISION, PORTLAND, OREGON, UNITED STATES ARMY CORPS OF ENGINEERS; JEFFREY BEDEY, COLONEL, DISTRICT ENGINEER, OMAHA DISTRICT, STATE OF NEBRASKA, STATE OF MISSOURI, STATE OF SOUTH DAKOTA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

State of North Dakota
WAYNE STENEHJEM
Attorney General

LYLE G. WITHAM
Counsel of Record
Assistant Attorney General
State Bar ID No. 04118
OFFICE OF THE ATTORNEY GENERAL
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Clean Water Act (CWA) § 303(c), 33 U.S.C. § 1313(c) (Appendix 91-93), requires states to enact water quality standards for their navigable waters. North Dakota adopted standards for Lake Sakakawea, a reservoir on the Missouri River. The U.S. Army Corps of Engineers operates the reservoir. CWA § 313(a), 33 U.S.C. § 1323(a) (Appendix 101-102), requires all federal agencies and facilities to comply with state "water pollution" laws – which include their water quality standards promulgated under § 303 – and waives the government's sovereign immunity so that states can enforce their environmental regulations against all federal facilities. But the court below held that § 313's waiver of immunity does not extend to the Corps' authority over navigation because CWA § 511(a), 33 U.S.C. § 1371(a) (Appendix 105), exempts the Corps from § 313's immunity waiver whenever the Corps' authority over navigation "would be affected." (Appendix 5) This holding erred in two respects:

First, Congress amended § 313 in 1977 (Appendix 100-104 and 120-122) to make clear that it applied to the Corps of Engineers, and the amending waiver language Congress added to § 313(a) in 1977 was clear and unconditional: "This subsection shall apply notwithstanding *any* immunity of such agencies, officers, agents, or employees under *any law or rule of law*." The court below ignored that Congress added this unconditional waiver language to § 313 and the reason it was added: The holding of the Eighth Circuit in *Minnesota v. Hoffman*, 543 F.2d 1198 (8th Cir. 1976), *cert. denied*, *Minnesota v. Alexander*, 430 U.S. 977 (1977), that had held that § 511(a) exempted the

QUESTION PRESENTED – Continued

Corps from the pre-1977 version of § 313 (Appendix 100-101). Although the legislative history to the 1977 CWA amendments often does refer to the Corps' dredge-and-fill authority – because that is what the *Hoffman* case that prompted the amendment to § 313(a) was about – the amendatory language was not limited to the Corps' dredge-and-fill authority. Rather, the 1977 amendment to § 313 made clear that it was a waiver that applied "notwithstanding *any* immunity of such agencies . . . under *any law or rule of law*" – including, but not limited to, the Corps' dredge-and-fill activities under the CWA that had prompted the amendment.

Second, the Court implies that any application of North Dakota's water quality standards necessarily interfere with navigation. This is not true. The water quality standards for Lake Sakakawea can be enforced in most instances without adversely affecting navigation at all, and in nearly all instances in a way that affects navigation only minimally. The question presented is:

Whether the court below erred in holding as a matter of law that the Clean Water Act exempts the Corps of Engineers from complying with water quality standards North Dakota is required to enact under § 303(c) of the Act?

LIST OF PARTIES

The following are parties to the proceeding below:

United States Army Corps of Engineers (and their responsible officers as listed in the heading)
State of Missouri (intervenor on appeal)
State of Nebraska
State of North Dakota

The following entities were part of the multidistrict proceedings, but were not parties in this case:

United States Department of the Interior
United States Fish & Wildlife Service
American Rivers
Environmental Defense
National Wildlife Federation
Iowa Wildlife Federation
Kansas Wildlife Federation
Montana Wildlife Federation
Nebraska Wildlife Federation
North Dakota Wildlife Federation
South Dakota Wildlife Federation
Izaak Walton League of America, Inc.
MO-ARK Association, a Kansas non-profit
Ergon Asphalt & Emulsions, Inc.
Magnolia Marine Transport Co.
Blaske Marine, Inc.
Koch Materials Co.
Mid-West Terminal Warehouse Co., Inc.
Tosco, a subsidiary of Phillips 66 Co.
Jebro, Inc.
Memco Barge Line, Inc.
Coalition to Protect the Missouri River, a Missouri non-profit
ConocoPhillips Co.

LIST OF PARTIES – Continued

Midwest Area River Coalition 2000, a Missouri non-profit
Missouri River Keepers, an Iowa non-profit
Missouri River Energy Services, Inc.
Nebraska Public Power Dist.
State of South Dakota (as a party in the district court, as an amicus curiae on behalf of appellant on appeal)
Mandan, Hidatsa & Arikara Nation (as an amicus curiae in both the district court and on appeal on behalf of appellant)

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Summary, Missouri River Environmental Impact Statement – Master Water Control Manual, Revised Draft (August 2001), entered as Exhibit 1 in the United States District Court, District of North Dakota ..... Bound Separately

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PETITION FOR A WRIT OF CERTIORARI

The petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

CITATIONS TO OPINIONS BELOW

The citations for the reported and unreported opinions in this case, the courts that issued them, and the dates of the opinions, are:

- 418 F.3d 915, 8th Cir., Aug 16, 2005 (decision on appeal) (Appendix 1-9)
- 320 F.Supp.2d 873, D.Minn., Apr 12, 2004 (ruling on Corps' motion to dismiss) (Appendix 10-20)
- 277 F.Supp.2d 1378, Jud.Pan.Mult.Lit., Aug 12, 2003 (order consolidating cases – multi-lit case)
- 270 F.Supp.2d 1115, D.N.D., Jul 14, 2003 (ruling on North Dakota's preliminary injunction motion) (Appendix 21-54)
- (unreported) 2003 WL 21704402, D.N.D., Jul 14, 2003 (ruling on South Dakota's preliminary injunction motion)
- 264 F.Supp.2d 871, D.N.D., May 29, 2003 (order granting Corps' motion not to extend state district court's temporary restraining order to the preliminary injunction hearing) (Appendix 55-76)
- (unreported) 2003 WL 21196263, D.N.D., May 16, 2003 (order changing the average daily cubic feet per second (cfs) that may be released under the temporary restraining order to address a least tern nesting issue)

In addition, included in the Appendix is the following unreported state district court order in this case:

- Order issued by N.D. Dist. Ct., McLean County, Apr 29, 2003 (granting ex parte temporary restraining order and order to show cause against the Corps) (Appendix 77-88)

BASIS FOR JURISDICTION

The Eighth Circuit Court of Appeals issued its opinion in this case on August 16, 2005. No motion for rehearing or hearing en banc was made by any party. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT FEDERAL STATUTES AND CWA § 303(c) STATE WATER QUALITY STANDARD

Since they are lengthy, the relevant provisions – §§ 303, 313, 510 and 511 – to the Federal Water Pollution Control Act,[1] commonly referred to as the "Clean Water Act," are set forth in their entirety in the Appendix. (§ 303 – Appendix 89-100; § 313 – Appendix 101-104; pre-1977 version of § 313 – Appendix 100; 1977 CWA amendments to § 313(a) – Appendix 120-121; § 510 – Appendix 104; and § 511 – Appendix 105-107)

The relevant provisions from North Dakota's rules under § 303(c) are:

> Surface water classifications, mixing zones, and numeric standards.
>
> 1. Classifications. Procedures for the classifications of streams and lakes of the state shall follow this subsection. Classifications of streams

[1] 33 U.S.C. §§ 1251-1387

and lakes are listed in appendix I and appendix II, respectively.

a. Class I streams. The quality of the waters in this class shall be suitable for the propagation or protection, or both, of resident fish species and other aquatic biota and for swimming, boating, and other water recreation. The quality of the waters shall be suitable for irrigation, stock watering, and wildlife without injurious effects. After treatment consisting of coagulation, settling, filtration, and chlorination, or equivalent treatment processes, the water quality shall meet the bacteriological, physical, and chemical requirements of the department for municipal or domestic use.

. . . .

f. Lakes. The type of fishery a lake may be capable of supporting is based on the lake's geophysical characteristics. However, the capability of the lake to support a fishery may be affected by seasonal variations or other natural occurrences which may alter the lake characteristics.

Class	Characteristics
1	Cold water fishery. Waters capable of supporting growth of Salmonid fishes and associated aquatic biota.
2	Cool water fishery. Waters capable of supporting growth and Propagation of nonsalmonid fishes and marginal growth of salmonid fishes and associated aquatic biota.
3	Warm water fishery. Waters capable of supporting growth and propagation of nonsalmonid fishes and associated aquatic biota.

4 Marginal fishery. Waters capable of supporting a fishery on a seasonal basis.

5 Not capable of supporting a fishery due to high salinity.

N.D. Admin. Code § 33-16-02.1-09(1)(a) & (f). *See* Appendix 108-111 for full text.

APPENDIX II

Lakes are classified according to the water quality characteristics which are to be maintained in the specified lakes. The beneficial uses and parameter limitations designated for class 1 streams shall apply to all classified lakes.

County	Lake	Classification
	Sakakawea	1

N.D. Admin. Code chapter 33-16-02.1 (Appendix II). (Sakakawea located in several counties.) Appendix 112-119.

PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

A. Basis for Federal Jurisdiction in Court of First Instance.

The State filed its action in state district court as allowed by CWA § 313(a)(C), 33 U.S.C. § 1323(a)(C), to enforce its water quality standards established under CWA § 303(c). The Corps removed this case as allowed by CWA § 313(a), 33 U.S.C. § 1323(a), "in accordance with section 1441 et seq. of Title 28." Federal issues and federal statutes are involved, so federal questions are presented.

B. Procedural History of the Case.

On several occasions in years prior to 2003, the North Dakota Department of Health, the North Dakota agency

responsible for implementing and enforcing the Clean Water Act, sent enforcement letters to the Corps when the Corps dropped surface levels of Lake Sakakawea close to 1825 msl (feet above "mean sea level") – a surface level where the volume of cold-water fish habitat in Lake Sakakawea becomes very low, and the ability of the lake to support its "designated use" as a cold-water fishery (meaning enough cold water exists throughout the summer to support a small but viable cold-water ecosystem) becomes marginal to non-existent (depending on the amount of wind, sunny days, and days with hot temperatures to warm up the lake that particular summer). *See* Appendix 141-155 (describing the lake dynamics that create and sustain cold water conditions that support a cold-water fishery).

In February 2003, the Department of Health served a notice of violation on the Corps when levels of Lake Sakakawea fell below 1825 msl, and other conditions were present that made it unlikely that enough snow melt and spring run-off would occur to provide a sufficient "spring rise" to sustain a cold-water fishery in Lake Sakakawea through the critical late summer period when it is most vulnerable without a change in Corps management.

When the Corps indicated that it would not change its operating plan that summer to attempt to comply with North Dakota's water quality standards, the Department filed a complaint for declaratory relief, and a motion for a temporary restraining order (TRO) and order to show cause for a preliminary injunction which was granted when it was filed.

Before this preliminary injunction hearing occurred, the Corps removed the case to federal district court as allowed under CWA § 313(a), 33 U.S.C. § 1323(a), and filed

a motion to dissolve the TRO. On May 7, the district court extended the state court TRO, "*nunc pro tunc*," and scheduled a hearing on the motion to dissolve. After hearing, on May 16 the district court issued an order modifying the TRO. On May 29, 2003, the district court dissolved the TRO, and set a hearing on North Dakota's motion for a preliminary injunction for June 4, 2003.

On June 4, 2003, the district court heard evidence on North Dakota's motion for a preliminary injunction. On July 14, 2003, the district court issued an order denying North Dakota's motion for a preliminary injunction.

In June 2003, the Corps also filed a motion to dismiss, claiming that the language of CWA § 511(a)(2)(A) should be construed to mean that there had been no waiver of sovereign immunity under the Act as it relates to the Corps. Before the motion was decided, a multi-district order combining this case with other Missouri River cases was issued. Further motions and briefing were allowed to all parties, and on October 31, 2003, North Dakota filed a cross-motion for partial summary judgment, asserting that the "to maintain navigation" language of Section 511(a) of the Clean Water Act (33 U.S.C. § 1371(a)) does not exempt, or make the Corps immune, from complying with other relevant federal statutes, including water quality standards established by states under the Clean Water Act as required by 33 U.S.C. § 1313(c). On April 12, 2004, the district court issued an order denying North Dakota's motion for partial summary judgment and granting the Corps motion to dismiss on the grounds of sovereign immunity and federal preemption. North Dakota appealed this determination to the Eighth Circuit Court of Appeals on May 10, 2004. Oral argument occurred in April, 2005,

and the Court of Appeals issued its decision on August 16, 2005.

C. Factual Background.

1. Why this case matters to North Dakota.

When the Missouri River's full length is combined with the Mississippi below its confluence, "[t]he combined Mississippi-Missouri system is approximately 3,870 miles long, making it the third-longest river system in the world."[2] It drains one-sixth of the United States as well as a small part of Canada.[3]

Because of differences in precipitation, and the West's high mountains, major differences exist between rivers lying east of, and rivers lying west of, the 100th meridian (a line that runs north-south almost directly through Bismarck, North Dakota):

> [W]estern rivers are not neat and tidy. Whereas rivers east of the 100th meridian are fed by reliable springs and rainfall, nearly all rivers of the arid West depend mainly on the melting of the mountain snowpacks. Most of their flow comes in a rush during the runoff of April, May, and June. In addition, the annual snowfalls fluctuate, often dramatically. The result is that western rivers

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[2] Robert Kelley Schneiders, *Big Sky Rivers: The Yellowstone and Upper Missouri*, 264 (University Press of Kansas 2003).

[3] *See* lodged exhibit served with this brief containing "Summary, Missouri River Environmental Impact Statement – Master Water Control Manual, Revised Draft (August 2001)," "Missouri River Dams & Lakes," page 6.

> are wildly inconsistent, both month to month and year to year.[4]

The upper Missouri River basin states of North Dakota, South Dakota, and Montana are in the transition zone between east and west, between where there is enough water, and where there is not. But too often the rains don't come. Much of North Dakota's present way of life, and much of the State's future, depends on the Missouri River and the water it brings.

Consequently, the court's decision in this case that the State has no right to enforce its water quality standards, and the beneficial uses they protect, when just a possibility exists that navigation "may be affected" – if that is the standard that preempts the State's authority under the Clean Water Act – then the State has suffered a devastating blow to its future.

> By volume, the Mississippi is the largest river in the United States, with a daily average discharge past New Orleans of 470,000 cubic feet per second (cfs). In comparison, the Upper Missouri's daily average discharge past Omaha is close to 30,000 cfs. The Mississippi's daily flow volume is [on average] fifteen times greater than the Upper Missouri.[5]

A river is a shared resource. There is an obligation to keep it clean for those down stream. And there is an obligation to use it wisely, and in a way that is fair for everybody. That is, essentially, the good neighbor policy that underlies the Clean Water Act. But North Dakota will

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[4] Charles F. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West*, 219-22 (Island Press 1992).

[5] Schneiders, supra footnote 2 at 264 (University Press of Kansas 2003).

never have the volume of water that flows past New Orleans or Omaha. The farther up the river you go, the more precious the water becomes.

In *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*,[6] this Court rejected the assertion that the Clean Water Act is only concerned with water "quality," and does not allow the regulation of water "quantity."[7] "This is an artificial distinction," this Court said. "In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery."[8] Thus, "there is recognition in the Clean Water Act itself that reduced stream flow, *i.e.*, diminishment of water quantity, can constitute water pollution."[9]

The issue in this case is the same as in *PUD No.1* – diminishing of water quality because of diminishing water quantity. But the decision of the court below says that *PUD No. 1* is not the law when navigation – as controlled by the Corps of Engineers – may "be affected." Since the Corps, under the Clean Water Act, has authority that extends over all navigable waters of the United States, this is, indeed, a significant exception. It affects much more than walleye, salmon, and rainbow smelt in North Dakota's largest deep water reservoir – Lake Sakakawea.

The district court, in dismissing the State's complaint, said that the Corps was in an impossible "either/or"

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[6] 511 U.S. 700 (1994).

[7] *Id.* at 719.

[8] *Id.*

[9] *Id.*

situation (Appendix 17). Instead of addressing North Dakota's request for relief – that the Corps be required to comply with the State's water quality standards when practicable (a position clarified in North Dakota's brief to the district court) – the district court ruled as if the State were requesting that its standards "always" trumped all other system uses (Appendix 17). North Dakota was aggressive in its initial TRO motion. There is only a small window of a couple weeks each spring for the smelt spawn – which requires level or rising water for the fertilized eggs to survive. Why was this important? Because young-of-the-year smelt (i.e., smelt hatched that spring) are not temperature-sensitive like adults (who die in prolonged conditions of warm water). So if the adult smelt population suffered a massive die-off, as North Dakota expected when it filed its TRO motion, at least some smelt would survive to the next year.

What about the initial reduction of 2,350 cfs the state district court ordered? (Appendix 86-87) By its own terms the order was to be re-considered in eight days (Appendix 87), and, based on projections, all other things being equal, releases over the summer from Gavins Point, the most southern of the six main stem dams controlled by the Corps, would have been about the same as the year before – a level that caused impacts to all areas of the Missouri Basin in 2002, but was devastating to none. (In 2002, an average of about 28,000 cfs was released over the summer; in 2003, the Corps planned to release an average of about 30,000 cfs; so a reduction of 2,350 cfs would have put everyone about where they were in 2002 based on April Corps' projections.) Then heavy rains fell throughout the Upper Missouri basin in May. So that by the time of the June 4, 2003, preliminary injunction hearing in federal court, the reduction in flow necessary to preserve

a minimum level of cold-water habitat was minimal – a few hundred cfs. So when the preliminary injunction was denied, the State did not appeal. The imminent danger for the year had passed. The underlying issue of the Corps' responsibility towards the State's water quality standards could be addressed in the declaratory judgment part of the case.

How was the minimum level of cold-water habitat determined? There was a 90% loss of the cold-water smelt biomass from 2001, when the volume of cold-water habitat in Lake Sakakawea stayed above 800,000 acre-feet, to 2002, when the volume of cold-water habitat in Lake Sakakawea fell below 200,000 acre-feet. Given the severe losses the year before, in the spring of 2003 it was the best evidence available. It was not a standard. It was a fact alleged in the complaint necessary to sustain Sakakawea's designated beneficial use.

If Lake Sakakawea had been allowed to keep a higher level to preserve cold-water habitat, would that have caused the other reservoirs to demand the same relief? Perhaps, but they are not in the same position factually. The six main stem dams subject to the Corps jurisdiction have a maximum storage capacity of over 73 million acre-feet.[10] But only three of those dams – Oahe in South Dakota, Sakakawea in North Dakota, and Fort Peck in Montana – account for more than 65 million acre-feet of that capacity. Sakakawea is the largest, with over 23.8 million acre-feet, and Fort Peck is the deepest, being 220 feet deep at its face when it is full. But all of them are large, cold-water reservoirs. (*See generally* information

[10] *See* footnote 3 above.

about the main-stem dams at Appendix 162 [chart found in pocket of back cover].)

But one factor distinguishes Sakakawea from Oahe and Fort Peck. Fort Peck's outtake draws its water from a structure that is 65 feet above the bottom of the lake. Oahe's outtake draws its water from a structure that is 99 feet above the bottom of the lake. Sakakawea's outtake is at the bottom of the lake. When the reservoirs are low, some cold-water habitat remains in Oahe and Fort Peck. But Sakakawea loses virtually all of its cold-water habitat when the lake drops too low, which, if sustained, means the loss, for all practical purposes, of the entire cold-water fishery. Is it fair to allow Sakakawea to keep enough water to sustain its designated use as a cold-water fishery? It depends on the severity of the impact on other system uses. They are identified in CWA § 303(c).[11] The State does not say that its standards trump all other system uses. Only that they are standards the Corps must comply with if feasible to do so without compromising other system uses. Short-term, it is fair to take special steps to address a special problem; long-term, a technology alternative must be identified that puts Sakakawea in a position where the entire cold-water fishery is not always endangered when the Lake is low. Drought cycles are part of the weather cycles on the plains. And as long as there are deep reservoirs that are primarily cold-water habitat for most of the year, they should be managed so that cold-water species can thrive in them.

Was the Corps in an "either/or" situation? The State's witnesses at the June 4, 2003 hearing suggested technology options that would not necessarily impact navigation.

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[11] 33 U.S.C. § 1313(c).

What has happened since? The Corps has on its own, and working with state engineers, conducted studies and experimented with options. For example, they have found that higher volume releases draw more warmer water from higher up in the reservoir. So by releasing water in a different pattern, but with the same daily average flow, more cold water can be preserved. (And more electricity can be generated at high demand times.) This summer the Corps conducted a study in which plywood was attached to two of the five outtakes. Just this step saved hundreds of thousands of acre-feet this summer. The cost? Less than $100,000 in actual expenses.[12] Does this solve the problem? No, but it is promising. Does this make the State's claim moot? No, the Corps still does not concede that it must comply with the § 303(c) standard. Technology forcing is, in most cases, the most important outcome from environmental standards. Take away the standard, and the engine that drives the system is gone.

What happens if the Corps balances system uses in a way a state does not agree with? As long as its discretion is reasoned and rationally based, the Administrative Practices Act protects the Corps in the exercise of their discretion. If an either/or situation truly exists, and the Corps makes a reasoned choice, they are protected. On the other hand, agencies do not have unlimited discretion. The Corps must comply with a standard if they are reasonably able to do so.

The Court of Appeals determined that the State's Complaint, on its face, interferes with navigation. The State's complaint does not mention navigation, or ask for

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[12] Lauren Donovan, "Plywood is Worth Its Weight," Bismarck Tribune, October 7, 2005.

any relief relating to navigation.[13] Relief that involves reduced flows from the dam may impact navigation, but there are usually options that minimize that impact. The Master Manual itself limits navigation, and eventually curtails it completely, when system levels drop below a certain point. Electricity generation, for example, requires a certain amount of "head" to turn the turbines. Instead of the tens of millions of dollars potentially lost by recreation to support navigation, electricity generates hundreds of millions of benefits each year that would be lost if the turbines have to be shut down because of insufficient "head." The point is, there are lots of alternatives that would have little or no impact on navigation. Several of them are summarized above.

The Court of Appeals claims that if each state is allowed to use its authority to establish water quality standards as the Clean Water Act requires, that the Corps' ability to control navigation would be "obviously" affected. For the reasons discussed above, this is not necessarily the case. In fact, the alternative is just as likely. For example, seven of the eight states who are members of the Missouri River Basin Association (a group of governor-appointed representatives) agreed to a flow management plan in 1999 that unfortunately was not adopted, although portions of it were.[14] The CWA allows States to form compacts and develop standards to be administered by an interstate agency.[15] For regional issues and regional problems, a regional regulatory body is a rational choice. Congress

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[13] Appendix 123-140.

[14] Appendix 156-159 and Lodged Exhibit (August 2001 EIS draft summary) at p. 8.

[15] CWA § 103, 33 U.S.C. § 1253.

must approve these and EPA has its usual oversight role.[16] Such standards have not had great impact on the Corps in their dredge and fill activities. There is no reason to think it would be any different here.

In fact, the revised draft of the Environmental Impact Statement completed in August 2001 (which formed the basis of the State's testimony at the June 3, 2003 hearing of economic impacts) identifies economic values for different system options that are for the most part uncontroversial:[17]

- Flood Control – annual system benefits all over $400 million under every option;
- Navigation – system benefits ranging from $1 million to $6.97 million;
- Hydropower – all options more than $741 Million annually;
- Water Supply – all options over $608 million annually; and
- Recreation – all options benefit system over $84.7 million annually.

The report also identifies cold-water and warm-water habitats for fish in its lakes and river reaches using criteria similar to the ones used by the State, and discusses other human and wildlife impacts.

In sum, navigation is the dominant issue on the Missouri not because it is an important system use or

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[16] *Id.*

[17] *See* lodged exhibit served with this brief containing "Summary, Missouri River Environmental Impact Statement – Master Water Control Manual, Revised Draft (August 2001)," "Missouri River Dams & Lakes," pp. 13-19.

because it has a priority under federal law, but because it requires the release of more water than is needed to support other downstream uses than would otherwise be necessary. This makes downstream states happy, and upstream states angry. This is especially true during a drought, when allocation of the impacts are disproportionably borne by upstream states because of this uneconomic release to support navigation. Will subjecting the Corps to state water quality standards stop it from supporting navigation? No, as long as its choices would pass muster under the standards of reasoned decision-making under the Administrative Practices Act.

REASONS FOR GRANTING THE PETITION

1.0 The decision of the Court below is of national significance for two reasons: First, it deprives states of authority to enforce their water quality standards under § 303(c) whenever, in the Corps' judgment, navigation may be impacted. Since the Corps has jurisdiction over all "navigable waters" under the CWA, this is an exception that swallows the whole. Second, it deprives states of their only tool for technology-forcing against the federal agency that has more impact on water quality than any other federal agency.

In this case, the court below begins its analysis where statutory analysis should always begin – with the plain meaning of the statute. But its analysis of the particular phrase and clause of CWA § 511(a) it identifies as controlling fails for several reasons discussed below, the principle one being a failure to construe the plain meaning of § 511(a) in the context of the Act of the whole, including

the plain meaning of the waiver language added to § 313(a) in 1977.

Not one of the sections of the Clean Water Act in question – § 303(c), § 510, § 511(a), or § 313(a) – is a model for clarity. The "plain-meaning" rule of construction often conflicts with the fact a statute is neither plain nor clear. But when a statute is less than clear, the answer is not to cherry-pick a phrase or clause out of context, and assign to it the meaning of the whole. This is especially true when the Act in question is the Clean Water Act – perhaps the most effective and successful environmental law ever drafted.[18] And it is even more important when the interpretation given to the out-of-context clause undermines the basic federalist structure of the Act – under which states are given primary responsibility for developing water quality standards for all water bodies within their jurisdictions, regulating all entities that cause pollution of those waters, and enforcing standards against the responsible parties when pollution occurs.

The decision in this case, if allowed to stand, means that the state of North Dakota has no way to enforce its water quality standards – and the designated beneficial uses those standards protect – against the federal agency that controls the largest and most important river in the state and the two most important bodies of water in the state: Lake Sakakawea, the largest main stem reservoir on the Missouri River system (a body of water that lies entirely in North Dakota), and Lake Oahe, the second largest main stem reservoir on the Missouri River system (a body of water that, when Lake Oahe is full, extends

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[18] *See, e.g.*, Gregg Easterbrook, *A Moment on Earth: the Coming Age of Environmental Optimism*, chapter 33 (Viking Penguin 1995).

from near the city of Pierre, South Dakota, across the southern border of North Dakota to near the city of Bismarck, about 70 miles north of the border).

But the holding in this case affects more than just the Missouri River and the system of six main stem dams in North Dakota, South Dakota, and Montana controlled by the Corps of Engineers. It holds that § 1371(a) "[o]n its face . . . exempts the Corps . . . from complying with the CWA when its authority to maintain navigation would be affected."[19] Since the definition of "navigable waters" at CWA § 502(7) (§ 1362(7))[20] gives the Corps sweeping jurisdiction over "waters of the United States" when it involves either navigation or dredge-and-fill operations involving navigable waters,[21] exempting the Corps "from complying with the CWA when its authority to maintain navigation would be affected"[22] is, on its face, a broad exemption that potentially applies to all navigable waters within a state's borders, and that potentially nullifies any

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[19] Appendix 5.

[20] 33 U.S.C. § 1362(7) (CWA definition of "navigable waters" as "the waters of the United States, including the territorial waters"). Since this brief refers to the legislative enactments that use Congress' sections of the Act, it will cite the section of the CWA followed by the citation to the same section of "33 U.S.C." that applies.

[21] *See, e.g., Solid Waste Agency of Northern Cook County v. U.S.*, 531 U.S. 159, 162, and *dissent* (Stevens) 175 (2001) (limiting the Corps' jurisdiction to "navigable waters"); and *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123-126 (1985) (interpreting the Corps jurisdiction over "adjacent wetlands" under CWA §§ 301, 404 & 502 (§§ 1311, 1344 & 1362)).

[22] Appendix 5. This case deals with a different issue than the issue raised in *Carabell v. U.S. Army Corps of Engineers*, 04-1384, that this Court recently granted *certiorari*, albeit one that may have significant impact on whatever the decision is in *Carabell* if the Court of Appeals decision in this case is not overruled.

state water quality standard if it in any way impinges on "the authority" of the Corps "to maintain navigation."

CWA § 303(c) (§ 1313(c)) requires that states adopt "water quality standards" for "navigable waters" within their borders, and that states review and revise those standards every three years. Those standards must include "the designated uses" for each of those "navigable waters" and "water quality criteria" that define and support the designated use identified for those waters, after taking into consideration a number of statutorily defined factors, including the "use and value" of those waters "for navigation":

> Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.[23]

Under § 303(c), North Dakota has designated uses for each reservoir, lake, and river – including Lake Sakakawea.[24] North Dakota's § 303(c) "water quality standards" classify Lake Sakakawea as a "Class 1" lake[25]

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[23] CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A).

[24] North Dakota's § 303 standards are at N.D. Admin. Code ch. 33-16-02.1. Relevant portions are in the Appendix 108-119.

[25] Appendix 119.

whose "designated use" is a "[c]old water fishery."[26] A "cold water fishery" is defined by the following water quality criteria: "Waters capable of supporting growth of salmonid fishes and associated aquatic biota."[27] The Court of Appeals held that this designated use of Lake Sakakawea as a cold-water fishery under § 303(c) could not be enforced against the Corps on the grounds noted above: CWA § 511(a) (§ 1371(a)) "[o]n its face . . . exempts the Corps . . . from complying with the CWA when its authority to maintain navigation would be affected."[28]

The question presented in this petition is primarily one of statutory construction. In addition to § 303(c) quoted above, three other provisions of the CWA are especially relevant:

- CWA § 510 (§ 1370) – addressing state authority under the CWA;
- CWA § 511(a) (§ 1371(a)) – creating, essentially, a rule of statutory construction that addresses, primarily, impairment of federal agency authority by the exercise of state authority under § 510 and other provisions of the CWA that give states primary authority for establishing and enforcing water quality standards within their jurisdictions (including the special rule of construction for the Corps' responsibilities under the CWA relating to navigation and dredge and fill activities on navigable waters relied on by the court below in this case); and
- CWA § 313(a) (§ 1323(a)) – waiving the immunity federal agencies ordinarily have from state and

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[26] Appendix 109.

[27] *Id.*

[28] Appendix 5.

local laws when state and local water pollution laws are applied to them.

The court below held, essentially, that the Corps is exempt from the clear waiver of federal immunity that applies to all federal agencies under § 313(a) when state (and local) water pollution laws are applied to them in this nearly all-inclusive circumstance: whenever "the authority" of the Corps "to maintain navigation" (and here is that no-one-is-responsible passive voice of the administrative bureaucracy) "would be affected." This holding creates a subjective standard – under which the Corps is immune from state and local water quality standards whenever the standard "affects" its "authority" to "maintain navigation." In doing so, the court below implicitly continues to rely on the false dilemma relied on by the district court in this case – that the Corps must choose between either complying with the State's water quality criteria for Lake Sakakawea or releasing enough water to continue to support navigation below the six main stem dams in the upper basin of the Missouri River[29] – when in fact there are numerous management alternatives that allow the Corps to continue to both support navigation and comply with North Dakota's water quality standards for Lake Sakakawea as promulgated under § 303(c).

The court below also asserts that "[i]t is also clear from the face of North Dakota's Complaint" that the State "is attempting to use its state water-quality standards to

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[29] There are also dozens of smaller dams (137 in fact) on the upper branches of the Missouri River – as well as one smaller main stem dam, Canyon Ferry near Helena, Montana (built as part of the various compromises that resulted in passage of Pick-Sloan Flood Control Act) – controlled by the Bureau of Reclamation. *See* Schneiders, supra, at 292-294.

affect the Corps' authority to release water from Lake Sakakawea to support navigation"[30] – but cites no evidence nor any documentation to support this claim. The Complaint speaks for itself: it contains no reference to, and no request for, any relief relating to navigation.[31] Its primary claims for relief are for a declaratory judgment that would require the Corps to comply with the designated use the State has established for the reservoir under § 303(c). This does not necessarily have to affect navigation. In fact, studies and experiments conducted by the Corps in the summers of 2004 and 2005 show relatively inexpensive operational and technological changes will go a long way towards preserving Lake Sakakawea's designated beneficial use as a cold-water fishery without impacting navigation – by changing how it releases water from the reservoir (in larger, shorter bursts that draw warmer water from higher in the reservoir) and by attaching plywood to two of the five dam outtakes so that not only the coldest water at the bottom of the dam is released, but also, again, warmer water from higher up in the reservoir's water column.[32] This illustrates one of the underlying principles of environmental regulation and environmental economics: "The first and most important point of environmental economics is that so far nearly all forms of conservation have cost less than expected, owing to unanticipated technical discoveries and free-market

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[30] Appendix 5.

[31] *See* the Complaint, Appendix 123-140.

[32] Lauren Donovan, "Plywood is Worth Its Weight," Bismarck Tribune, October 7, 2005.

innovations."[33] One of the purposes of environmental laws is to have this technology-forcing effect.[34] But as Bruce La Pierre noted in 1977 (and this case illustrates), political pressure and bureaucratic delays can cause the theoretical incentive for major innovation to evaporate.[35] Nothing works like a requirement and a deadline to force innovation and cause action. In this case, the requirement – the designated beneficial use of Lake Sakakawea as a cold-water fishery under § 303(c) – drives the solution: realistic and cost-effective management techniques and technology innovations. But the decision of the court below removes that requirement and takes away the Corps' technology-forcing incentive.

2.0 Reading preemption into § 1371(a) significantly undermines the federalism that makes the Clean Water Act function, and sets a precedent this Court should not allow.

The Clean Water Act reserves to states the primary authority to regulate pollution under the federalist structure that has made it the effective law that it is: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult

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[33] Easterbrook, supra, at 318. *See also, e.g., id.* 178: "[O]nce utilities finally had no choice but to reduce acid rain, they discovered the task could be accomplished more cheaply than anticipated."

[34] *See generally*, D. Bruce La Pierre, "Technology-Forcing and Federal Environmental Protection Statutes," 62 Iowa L.Rev. 771 (1977).

[35] *Id.* at 837-38.

with the Administrator in the exercise of his authority under this chapter." CWA § 101(b), 33 U.S.C. § 1251(b). States have primary authority for regulating pollutants discharged from point sources under § 301 (§ 1311) and for establishing water quality standards and protecting beneficial uses under § 303. Reading preemption into § 313's waiver of immunity would set a precedent that undermines state authority to protect the health and safety of its citizens against the entity that has more impact on water quality through its activities than, perhaps, all other federal agencies combined.

Although federal law can supplant state authority, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law."[36] This presumption is at its zenith when federal law impinges upon core state police powers. States have long possessed primary responsibility in our federal system to protect the health, welfare, safety, and morals of their citizens. The Supreme Court has indicated "that when a State's exercise of its police power is challenged under the Supremacy Clause, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[37] This "approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety."[38] Restrictions aimed at promoting the

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[36] *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *see also Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1305 (4th Cir.1992)

[37] *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978) (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see also Reid v. Colorado*, 187 U.S. 137, 148 (1902).

[38] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

welfare, safety, and morals represent a well-recognized exercise of state police power.[39]

State provisions are invalidated only where there was an *actual conflict* between state and federal law. Where there is no such conflict, the Court has steadfastly refused to infer preemption in the field of environmental protection, an area that lies at the core of the states' police powers. *See Ray*, 435 U.S. at 157 ("[W]hen a State's exercise of its police power is challenged under the Supremacy Clause, 'we start with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'") (*quoting Rice*, 331 U.S. at 230).

3.0 The interpretation given to § 511(a) by the Court below is not internally consistent.

The court below finds that the language of § 511(a)(2)(A) underlined below exempts the Corps from the waiver of federal immunity in § 313(a) "when its authority to maintain navigation would be affected." But the court below also determined that this provision does *not* exempt the Corps for its § 404 dredge-and-fill responsibilities under the CWA. Appendix 6 (implying that the 1977 CWA amendments were limited to "channel-dredging operations").

> This chapter [the CWA] shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter; (2) affecting or impairing the authority

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[39] *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986).

> of the Secretary of the Army (A) to maintain navigation[40] or (B) under the Act of March 3, 1899 (30 Stat. 1112 (sic.)). . . .

33 U.S.C. § 1371(a). (Language quoted and found controlling by the court below underlined. *See* Appendix 6.)

On its face, § 511(a) appears to be a rule of construction that qualifies a waiver, not an exemption that exempts the Corps from the unqualified waiver in § 313(a), (§ 1323(a)).

It is critical to note what the second half the disjunctive in § 511(a)(2) – referring to "the Act of March 3, 1899" – is a reference to the Corps' "channel-dredging" authority:

> The Act of March 3, 1899, referred to in subsec. (a), is Act Mar. 3, 1899, c. 425, 30 Stat. 1121, as amended, which enacted sections 401, 403, 404, 406, 407, 408, 409, 411 to 416, 418, 502, 549, and 687 of this title and amended section 686 of this title. For complete classification of this Act to the Code, see Tables.

See Appendix 107. Again, these references refer to the Corps' § 404 dredge-and-fill responsibilities under the CWA. The first half of this disjunction – (2)(A) – cannot mean one thing (the Corp is exempt for navigation), and

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[40] *See* 33 U.S.C. §§ 401-430 (relating to navigation and navigable waters). *Compare, e.g., Solid Waste Agency of Northern Cook County v. U.S.*, 531 U.S. 159, 175 (2001) (*dissent* Stevens: "In § 13 of the Rivers and Harbors Appropriation Act of 1899 (RHA), 30 Stat. 1152, as amended, *33 U.S.C. § 407*, Congress had assigned to the Army Corps of Engineers (Corps) the mission of regulating discharges into certain waters in order to protect their use as highways for the transportation of interstate and foreign commerce; the scope of the Corps' jurisdiction under the RHA accordingly extended only to waters that were 'navigable.'")

the second half – (2)(B) – another (the Corp is not exempt for dredge-and-fill).

4.0 CWA § 313(a) by its plain meaning provides an unqualified waiver of immunity.

The court below ignored the two sentences that the 1977 CWA amendments added to § 313(a) after the language of § 313(a) that the court quoted at Appendix 4-5. The underlined language below is the language quoted by the court below, followed by the two sentences added in the 1977 amendments to the Act:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants,[41] and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal,

[41] All language after this comma was added by the CWA amendments of 1977. Appendix at 101-102 and 120-121. The language of § 313 before these amendments is also in the Appendix 100-101.

> State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.

Congress added the amendatory language to this section in 1977 as illustrated in the Appendix document referenced in footnote 42 in response to the Eighth Circuit's holding in *Minnesota v. Hoffman*, 543 F.2d 1198, 1208 (8th Cir. 1976), *cert. denied*, *Minnesota v. Alexander*, 430 U.S. 977 (1977) (Holding "what is asserted to be the literal meaning of s 313 must be interpreted to give effect to the intent of Congress that the Corps is not to be hampered in maintaining navigation.").

Congress amended § 313 in 1977 (Appendix 100-104 and 120-122) to make clear that it applied to the Corps of Engineers, and the amending waiver language Congress added to § 313(a) in 1977 was clear and unconditional: "This subsection shall apply notwithstanding *any* immunity of such agencies, officers, agents, or employees under *any law or rule of law*." The court below ignored that Congress added this unconditional waiver language to § 313 and the reason it was added – because of the holding of the Eighth Circuit in *Hoffman* that had held that § 511(a) exempted the Corps from the pre-1977 version of § 313 (Appendix 100-101). Although the legislative history to the 1977 CWA amendments often does refer to the Corps' dredge-and-fill authority – because that is what the *Hoffman* case that prompted the amendment to § 313(a) was about – the amendatory language was not limited to the Corps' dredge-and-fill authority. Rather, the 1977 amendment to § 313 made clear that it was a waiver that

applied "notwithstanding *any* immunity of such agencies . . . under *any law or rule of law*" – including, but not limited to, the Corps' dredge-and-fill activities under the CWA that had prompted the amendment.

It is true that a waiver of federal immunity must be explicit, not implicit. But the unqualified nature of the waiver added in the 1977 amendments italicized above is plain. And if the plain meaning of the last sentence above does not satisfy this strict requirement, then it is unlikely any language ever could: "*This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.*"

5.0 The holding of the Court below is inconsistent with the mandate of this Court in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology.*[42]

The reasons this is so were noted at the beginning of this petition. Again, in *PUD No. 1,* this Court rejected the assertion that the Clean Water Act is only concerned with water "quality," and does not allow the regulation of water "quantity."[43] "This is an artificial distinction," this Court said. "In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery."[44]

In this case, water quantity is also closely related to water quality: In fact, the protection of the designated use

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[42] 511 U.S. 700 (1994).

[43] *Id.* at 719.

[44] *Id.*

of Lake Sakakawea as a cold-water fishery under § 303(c) depends on it. The only difference between the cases is that in *PUD No. 1* the beneficial use being protected involved a stream and in this case it involves a lake.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

State of North Dakota
WAYNE STENEHJEM
Attorney General

LYLE G. WITHAM
Counsel of Record
Assistant Attorney General
State Bar ID No. 04118
OFFICE OF THE ATTORNEY GENERAL
500 North 9th Street
Bismarck, ND 58510-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300

November 2005

418 F.3d 915

United States Court of Appeals,
Eighth Circuit.
In re: OPERATION OF THE MISSOURI RIVER SYSTEM LITIGATION
State of North Dakota, through the North Dakota Department of Health, an Agency of the State of North Dakota; John Hoeven, Governor; Wayne Stenehjem, North Dakota Attorney General, Ex. Rel. State of North Dakota; North Dakota Department of Health, Appellants,
v.
United States Department of the Army, the Corps of Engineers, a Federal Agency; David Fastabend, General Commander, Nw Division, Portland, Oregon, United States Army Corps of Engineers; Kurt F. Ubbelohde, Lt. Colonel, District Engineer, Omaha District, Appellees,
State of Nebraska, Appellee,
State of Missouri, Intervenor on Appeal.
State of South Dakota, Amicus on Behalf of Appellant,
The Mandan, Hidatsa and Arikara Nation, Amicus on Behalf of Appellant.
No. 04-2204.

Submitted: April 11, 2005.
Filed: Aug. 16, 2005.

Lyle G. Witham, argued, Assistant Attorney General, Bismarck, ND, for appellants.

Robert H. Oakley, argued, U.S. Dept. of Justice, Environment & Natural Resources Division, Washington, DC, (Fred R. Disheroon and Danile W. Pinkston of the Environment & Natural Resources Division, on brief), for

appellees Ubbelohde, Fastabend and U.S. Dept. of the Army, et al.

Before WOLLMAN, BEAM, and GRUENDER, Circuit Judges.

GRUENDER, Circuit Judge.

North Dakota appeals the district court's[1] dismissal of its suit to enjoin the United States Army Corps of Engineers ("the Corps") from releasing water from Lake Sakakawea to support downstream navigation on the Missouri River. North Dakota's complaint alleges that the releases violate water quality standards for Lake Sakakawea established pursuant to the Clean Water Act. For the reasons discussed below, we affirm.

I. BACKGROUND

Lake Sakakawea is a reservoir in North Dakota formed by the enclosure of the Garrison Dam, part of the Missouri River main stem reservoir system established by the Flood Control Act of 1944 ("FCA"). The FCA assigns to the Corps the task of managing the main stem reservoir system. The Corps releases water from Lake Sakakawea into the Missouri River to support downstream navigation in accord with the goals of the FCA.[2] North Dakota filed suit to enjoin the releases from Lake Sakakawea on the

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[1] The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

[2] For more background on the operation of the Missouri River main stem reservoir system, see our related opinion in *In re: Operation of the Missouri River System Litigation*, Nos. 04-2737/04-2774/04-2785/04-2794/04-2878/04-2994, also released today.

grounds that lowering the level of the lake would violate state-law water-quality standards established pursuant to the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* ("CWA"). The states of Nebraska and South Dakota also filed complaints as intervenors.

The CWA is a federal law that directs the states to adopt state-law water-quality standards. *Id.* at § 1313. The state water-quality standards must incorporate a designated use for each navigable body of water, as well as water-quality criteria based on the designated use. *Id.* at § 1313(c)(2)(A). "Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." *Id.* Pursuant to the CWA, North Dakota designated Lake Sakakawea as a "cold water fishery," requiring the water to support the growth of salmonid fishes and associated water life. In accord with that designation, North Dakota instituted certain water-quality standards. North Dakota contends that the Corps' releases of water from Lake Sakakawea violate these water-quality standards because they reduce the volume of cold-water habitat in the lake below that needed to support a viable cold-water fishery ecosystem.

The district court dismissed the North Dakota complaint under Fed.R.Civ.P. 12(b)(6), holding that the CWA preserves sovereign immunity from suit for the Corps when the Corps' authority to maintain navigation is at issue. The district court also dismissed the appeals of the intervenors as moot. North Dakota appeals, arguing that the CWA waives the Corps' sovereign immunity in this case.

II. DISCUSSION

"We review de novo a district court's order granting a motion to dismiss, viewing the allegations in the complaint in the light most favorable to the plaintiff." *Casazza v. Kiser*, 313 F.3d 414, 418 (8th Cir.2002). "Like the District Court, we must accept the allegations of the complaint as true and dismiss the case only when 'it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief.'" *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). The district court's interpretation of the CWA is reviewed de novo. *United States v. Templeton*, 378 F.3d 845, 849 (8th Cir.2004).

North Dakota cannot enforce its state water quality standards against the Corps, a federal agency, unless Congress has unequivocally waived the federal government's sovereign immunity from suit. *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615, 112 S.Ct. 1627, 118 L.Ed.2d 255 (1992). "Waivers of immunity must be construed strictly in favor of the sovereign. . . ." *Id.* (quotations omitted). The CWA contains a limited waiver of sovereign immunity:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity. . . .

33 U.S.C. § 1323(a). This waiver of sovereign immunity is further limited by 33 U.S.C. § 1371(a), which states: "[The CWA] shall not be construed as . . . affecting or impairing the authority of the Secretary of the Army . . . to maintain navigation."

"Unless exceptional circumstances dictate otherwise, when we find the terms of a statute unambiguous, judicial inquiry is complete." *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1032 (8th Cir.2003) (quoting *Burlington Northern Railroad Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 461, 107 S.Ct. 1855, 95 L.Ed.2d 404 (1987)). On its face, § 1371(a) exempts the Corps, which operates under the authority of the Secretary of the Army, from complying with the CWA when its authority to maintain navigation would be affected. It is also clear from the face of North Dakota's complaint that North Dakota is attempting to use its state water-quality standards to affect the Corps' authority to release water from Lake Sakakawea to support navigation. There are no exceptional circumstances here to indicate that Congress would not have intended the § 1371(a) "navigation exception" to the waiver of sovereign immunity to apply in this case.[3]

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[3] The Corps argues that § 1323(a) can be read as not waiving sovereign immunity in this case because the Corps merely is releasing water from the reservoir, not discharging pollutants. Because we find § 1371(a) independently preserves the Corps' sovereign immunity in this case, we do not address the Corps' argument concerning the interpretation of § 1323(a).

We note that in *National Wildlife Federation v. United States Army Corps of Engineers*, 384 F.3d 1163 (9th Cir.2004), the Ninth Circuit held that § 1323(a) waived sovereign immunity with respect to the Corps' discretionary operation of dams on the Snake River. Nevertheless, the Ninth Circuit held that the CWA could not be enforced against the Corps where state-law water-quality violations were due to "the

(Continued on following page)

The CWA was amended in 1977 to emphasize that it applies to discharges from the Corps' channel-dredging operations. North Dakota argues that the legislative history from the 1977 amendment evidences Congress' intent for the Corps to comply with the CWA in all its operations, in spite of the navigation-based limitation in § 1371(a). This argument fails because the 1977 amendment, while emphasizing that the limited waiver of sovereign immunity in § 1323(a) applied to the Corps, left the clearly worded navigation exception in § 1371(a) intact. "Absent some ambiguity in the statute, we have no occasion to look to legislative history." *Clark*, 315 F.3d at 1032. There is nothing ambiguous about the admonition of § 1371(a) that the CWA "shall not be construed as . . . affecting or impairing the authority of the Secretary of the Army . . . to maintain navigation." As a result, we do not reach the legislative history in this case.[4]

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existence of the dams and not any discretionary method of operating the dams." *Id.* at 1178. The Corps' authority to maintain navigation was not at issue in that case.

[4] In any event, the legislative history from the 1977 amendment would not support North Dakota's argument. The legislative history indicates that Congress' intent in enacting the 1977 amendments was to subject the Corps' *channel-dredging* activities to state water-quality standards promulgated pursuant to the CWA, while preserving its authority to maintain navigation. The relevant passages from the legislative history of the 1977 amendments are as follows:

> The amendment is prompted by varying legal interpretations of the applicability of [CWA] sections 313 [33 U.S.C. § 1323] and 404 [33 U.S.C. § 1344] to dredging activities. In 1975, the U.S. District Court in Minnesota [held] that section 313 and legislative history of the [CWA] required the Corps of Engineers to comply with State water quality standards in dredging activities carried out in the State of Minnesota. . . . This judgment was reversed in 1976 by the Eighth Circuit Court of Appeals, which found that the legislative

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North Dakota also argues that whether compliance with its CWA water-quality standards would affect the Corps' authority to maintain navigation is a factual question. For example, Lake Sakakawea was constructed so that water releases siphon water from near the bottom of the lake. North Dakota suggests that the construction of new outflow structures at Garrison Dam to siphon warmer water from the top of Lake Sakakawea, rather than colder water from the bottom, might allow the Corps to comply with North Dakota's water-quality standards for a cold-water

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history of the [CWA] conveyed an intent on the part of Congress to exempt the Corps of Engineers, operating under section 404 [governing permits for dredging], from State environmental law despite the language of section 313. [*Minnesota v. Hoffman*, 543 F.2d 1198 (8th Cir.1976), *cert. denied, Minnesota v. Alexander*, 430 U.S. 977, 97 S.Ct. 1672, 52 L.Ed.2d 373 (1977).]

By this amendment, the committee clarifies that corps dredging activities are not exempt from State pollution abatement requirements. In spite of language on section 313 in the Senate report on the 1972 act, . . . the Supreme Court ruling in the Minnesota case would otherwise free corps-conducted dredging from compliance with State water quality standards. The intention of the 1972 act was not to exempt the corps or any other public or private agency from State water quality standards and the interpretation of section 404 by the courts is at variance with the intent of Congress. In fact, Congress intended that section 404 in the 1972 act would in its initial implementation end the open water disposal of dredge spoil. Quite the contrary has been the case.

. . . .

This amendment to section 404 is neither intended nor expected to result in compromising the ability of the corps to maintain navigation.

S. Rep. No. 95-370, at 68-69 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4393-94.

fishery while still providing the requisite water releases to maintain navigation. If we allowed North Dakota to enforce its water-quality standards on this basis, there is no discernible limit to the new structures and new operational plans that other states with main-stem reservoirs could demand to force the Corps to comply with their own water-quality standards. If each state is allowed to use its reservoir water-quality standards as a tool to control how the Corps must release water from the main stem reservoirs, the "authority of the Secretary of the Army . . . to maintain navigation" will obviously be affected, in violation of § 1371(a).

As the district court noted, the above result is also supported by the principles of preemption. Implied conflict preemption arises "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Nordgren v. Burlington Northern Railroad Co.*, 101 F.3d 1246, 1248 (8th Cir.1996) (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995) (internal citations omitted)). "In determining whether state law 'stands as an obstacle' to the full implementation of a federal law, 'it is not enough to say that the ultimate goal of both federal and state law' is the same." *Forest Park II v. Hadley*, 336 F.3d 724, 733 (8th Cir.2003) (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987)). "A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach that goal." *Id.* (quoting *Int'l Paper Co.*, 479 U.S. at 494, 107 S.Ct. 805). "Thus, 'where a state statute conflicts with, or frustrates, federal law, the former must give way.'" *Id.* (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993)).

Congress established the goals for the Missouri River main stem reservoir system in the FCA. The dominant functions of the project are flood control and downstream navigation, and secondary interests include irrigation, recreation, fish and wildlife. *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1019-20 (8th Cir.2003). Congress also set forth the method by which the federal statute was designed to reach those goals – the FCA vests the Corps with the duty to balance navigation with other water-use interests, including the interests of the reservoir states. *Ubbelohde*, 330 F.3d at 1027. Allowing individual states to use their water-quality standards to control how the Corps balances water-use interests would frustrate the design of the FCA. Accordingly, the enforcement of state water-quality standards against the Corps' release of water from Lake Sakakawea is preempted.

The CWA's preservation of sovereign immunity where the Corps' authority to maintain navigation would be affected and the principles of preemption preclude the enforcement of North Dakota's state water-quality standards against the Corps' releases of water from Lake Sakakawea. Therefore, the district court did not err in dismissing North Dakota's complaint.

III. CONCLUSION

For the reasons discussed above, we affirm the dismissal of North Dakota's complaint.

320 F.Supp.2d 873

United States District Court,
D. Minnesota.
In re: OPERATION OF THE MISSOURI RIVER SYSTEM LITIGATION
North Dakota et al.,
v.
U.S. Army Corps of Engineers,
Nos. 03-MD-1555(PAM), 03-4288(PAM).

April 12, 2004.

Daniel H. Israel, Boulder, CO, Lisbeth Jane Nudell, Nudell Law Office, Mpls, MN, David D. Cookson, Jon C. Bruning, Nebraska Atty General's Office, Donald G. Blankenau, Thomas R. Wilmoth, Fennemore Craig PC, Lincoln, NE, for Intervenor Plaintiffs.

Anne E. Mahle, Brian Boru O'Neill, Peter C. Hennigan, Richard A. Duncan, Faegre & Benson, Mpls, MN, Cassandra Sturkie, David A. Becker, David J. Hayes, Janice M. Schneider, Julia A. Hatcher, Latham & Watkins, Sam Kalen, Van Ness Feldman PC, Timothy D. Searchinger, Environmental Defense, Washington, DC, for Intervenor.

James A. Maysonett, US Dept of Justice, Environment and Natural Resources, Washington, DC, for Cross Defendant.

MEMORANDUM AND ORDER

MAGNUSON, District Judge.

This matter is before the Court on Defendants U.S. Army Corps of Engineers, Brigadier General William T. Fasoli, and Colonel Kurt F. Ubbelohde's Motions to Dismiss

Plaintiffs' Complaint and the Complaints of Intervenors Nebraska and South Dakota. In October 2003, Plaintiffs' filed their opposition to the Motion to Dismiss and filed a cross-Motion for Partial Summary Judgment. In November 2003, Nebraska filed a Motion for Summary Judgment. Pursuant to the Court's March 9, 2004, Amended Scheduling Order, all parties were permitted to file supplemental memoranda. On April 1, 2004, Plaintiffs' filed a Motion to File an Amended Complaint. For the following reasons, the Court grants the Motions to Dismiss Plaintiffs' Complaint and the Complaints of Intervenors Nebraska and South Dakota and denies the remaining motions as moot without prejudice.

BACKGROUND

The Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, was enacted "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In order to achieve this objective, the CWA directs the states to promulgate water quality standards. 33 U.S.C. § 1313(a). Water quality standards are specific to a particular body of water, and must satisfy certain procedural and substantive requirements to be valid. *Id.* § 1313(c). In particular, the CWA requires that state water quality standards be established "taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial and other purposes, and also taking into consideration their use and value for navigation." *Id.* § 1313(c)(2)(A). Water quality standards must consist of both a designated use for the navigable body of water at issue, and a wate- quality criteria for this body of water based on such use. *Id.* § 1332(2)(A).

North Dakota enacted water quality standards under the CWA. N.D. Admin. Code, Ch. 33-16-02.1 *et seq.* Lake Sakakawea, the reservoir created by the Garrison Dam, is located in North Dakota on the Missouri River. Lake Sakakawea has a designated use as a "cold water fishery," requiring that the water must be "capable of supporting growth of salmonid fishes and associated aquatic biota." *Id.* § 33-16-02.1-09(1)(f). The water quality criteria for Lake Sakakawea requires that the water not exceed temperatures of 85 degrees fahrenheit, and maintain a dissolved oxygen content of at least 5 mg/l. *Id.* at Table 1. These regulations also contain narrative standards.

In February 2003, the North Dakota Department of Health issued a "Notice of Violation" of North Dakota's water quality standards against Defendants U.S. Army Corps of Engineers, Brigadier General William T. Fasoli, and Colonel Kurt F. Ubbelohde (collectively, "the Corps"), with respect to their operation of the Garrison Dam and Lake Sakakawea. In April 2003, the State of North Dakota, Governor John Hoeven, and Attorney General Wayne Stenehjem (collectively, "North Dakota"), filed their Complaint in state court, seeking a declaration that the Corps' management of the river in 2003 violated North Dakota's water quality standards, and injunctive relief requiring that the Corps comply with such standards. On April 30, 2003, the Corps removed the case to the United States District Court for the District of North Dakota.[1] In

[1] Nebraska and South Dakota intervened in this action. South Dakota seeks an order that water elevations in other main stem reservoirs not be lowered in order to raise the water in Lake Sakakawea, and Nebraska requests that the Corps maintain downstream interests by drawing from the upper reservoirs. (Defs.' Mem. in Supp. of Mot. to Dismiss.) In addition to this case, Nebraska and South Dakota

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July 2003, Judge Hovland denied North Dakota's Motion for a Preliminary Injunction. *North Dakota v. U.S. Army Corps of Eng'rs*, 270 F.Supp.2d 1115 (D.N.D.2003).

In June 2003, the Corps filed this Motion to Dismiss the Complaint, claiming that there had been no waiver by the Government of its sovereign immunity. In response, North Dakota's Motion for Partial Summary Judgment asserts that the CWA waives immunity for the Corps. In response to this Motion for Summary Judgment, the Corps further argues that the Court lacks jurisdiction, on the basis that North Dakota's claims are moot and no longer ripe for review. The supplemental memoranda filed the parties asserts the same arguments.

DISCUSSION

A. Standard of Review

For the purposes of the Motion to Dismiss, the Court takes all facts alleged in the Complaint as true. *Westcott v. Omaha*, 901 F.2d 1486, 1488 (8th Cir.1990). The Court must construe the allegations in the Complaint and reasonable inferences arising from the Complaint favorably to Plaintiff. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir.1986). A motion to dismiss will be granted only if "it appears beyond doubt that the Plaintiff can prove no set of facts which would entitle him to relief." *Id.; see also Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

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have brought their own individual lawsuits against the Corps. These suits are pending before this Court.

B. Sovereign Immunity

North Dakota seeks a declaration that the Corps must comply with its state water quality standards. (Compl. at 16-17.) In denying North Dakota's Motion for a Preliminary Injunction, Judge Hovland iterated North Dakota's most significant obstacle:

> Although the Corps of Engineers has been held liable for non-compliance with state water quality laws in one other reported decision, the courts have yet to see one state along a major river system comprised of several dams and reservoirs spread over many states succeed in a state water quality standards enforcement action.

North Dakota v. U.S. Army Corps of Eng'rs, 270 F.Supp.2d 1115, 1128 (D.N.D.2003) (*North Dakota I*) (distinguishing *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 132 F.Supp.2d 876 (D.Or.2001) (determining that § 1323(a) requires federal facilities and activities to comply with state water quality standards)). In particular, Judge Hovland noted that "the issue of sovereign immunity looms large in this case." *North Dakota I*, 270 F.Supp.2d at 1128.

Sovereign immunity protects the federal government and its agencies from suit. This immunity must be unequivocally waived by an act of Congress. *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 615, 112 S.Ct. 1627, 118 L.Ed.2d 255 (1992). "Waivers of immunity must be construed strictly in favor of the sovereign." *Id.* (citations omitted). Therefore, in order for North Dakota to maintain this suit, the CWA must waive immunity for the Corps.

1. *33 U.S.C. § 1323(a) Waiver of Sovereign Immunity*

33 U.S.C. § 1323(a) states in relevant part:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants . . . shall be subject to, and comply with, all Federal, State, interstate and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution . . . in the same manner, and to the same extent as any nongovernmental entity.

To claim sovereign immunity, the Corps must show that this statute does not apply. The Corps argues that this statute only constitutes a waiver in "discharge or runoff" cases, which North Dakota concedes this case is not. The Corps relies heavily on the Eighth Circuit's limited interpretation of the statute:

> The district court held that the [CWA] subjects the Corps of Engineers to state water quality laws only if it were causing "the discharge or runoff of pollutants." The district court concluded [that] the [Missouri State Clean Water Act] did not apply because soil erosion and reduction of oxygen did not constitute a "discharge" or "runoff" of pollutants . . . [w]e cannot say that the district court erred in finding [that] the [Missouri State Clean Water Act] did not apply.

Missouri ex rel. Ashcroft v. Dep't of the Army, 672 F.2d 1297, 1304 (8th Cir.1982). According to the Corps, *Ashcroft* limits the waiver of immunity to discharge or runoff cases only. 33 U.S.C. § 1323(a)(2). However, it likewise clear

from *Ashcroft* that the Eighth Circuit did not consider the possibility that immunity could be waived if the Government had jurisdiction over the particular property or facility. *See* 33 U.S.C. § 1323(a)(1). This statute is disjunctive, in that immunity can be waived either because the Government has jurisdiction over the particular property or facility, or because the Government has engaged in activities that result in the runoff or discharge of pollutants. 33 U.S.C. § 1323(a). Because there is no dispute that the Corps has jurisdiction over the Garrison Dam and Lake Sakakawea, it is possible that this statute may waive sovereign immunity for the Corps. 33 U.S.C. § 1323(a)(1).

2. *33 U.S.C. § 1371 Waiver of Sovereign Immunity*

However, even if § 1323(a) constituted a waiver of sovereign immunity in this particular case, it would not be a complete waiver of sovereign immunity. *See North Dakota I*, 270 F.Supp.2d at 1123. The CWA further provides:

> [The CWA] shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter; (2) affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation
> . . .

33 U.S.C. § 1371. Thus, § 1371 provides sovereign immunity for the Corps when compliance with North Dakota's water quality standards might affect or impair the authority of the Corps to maintain navigation.

The Corps must operate the Missouri River to control flooding and maintain downstream navigation. *ETSI*

Pipeline Project v. Missouri, 484 U.S. 495, 512, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988); *see* 33 U.S.C. § 701 *et seq.* (Flood Control Act ("FCA")); *see also* H.R. Doc. No. 475, 78th Cong., 2d Sess. 28-29 (1944); S. Doc. No. 247, 78th Cong., 2d Sess. 3 (1944). North Dakota's current water quality laws require that the levels of Lake Sakakawea remain at certain height and gas levels to maintain the reservoir as a cold water fishery. Here, the Corps is faced with an either-or situation: it can either comply with North Dakota's water quality standards and potentially violate its statutory obligation under the FCA to maintain navigation, or it can operate as required under the FCA and potentially violate North Dakota's water quality standards. Although it is possible that the Corps may be able to simultaneously meet both its obligations to maintain navigation and the water quality standards established by North Dakota, the Court simply cannot require the Corps to always do both.[2] In this instance, water quality standards that require specific water levels and gas compositions in a reservoir that segments a major river system that traverses multiple states affects the Corps' ability to maintain navigation. Therefore, in this instance, the Court finds that the CWA does not provide for a complete waiver of sovereign immunity.[3]

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[2] This same theory applies to all of the states along the Missouri River basin. The Court simply cannot order that the Corps always comply with the water quality standards of each state, in the Corps' operation of an interstate river system. Although it may be possible for the Corps to successfully comply with all of the states' water quality laws, an order of absolute compliance disregards the Corps' other obligations under federal law.

[3] The Court declines to determine whether the FCA trumps the CWA in all instances. Rather, the Court narrowly holds that North Dakota cannot maintain a state water quality enforcement action that

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Plaintiffs attempt to present a genuine issue of material fact on whether North Dakota's water quality standards actually affect or impair "navigation." Plaintiffs submit that maintaining navigation simply requires that the Missouri river have "enough water flowing down the river to at least float a canoe." (Pls.' Mem. Mar. 26, 2004 at 17.) Plaintiffs also submit that "[n]avigation under the CWA does not mean navigation as the Corps interprets navigational requirements under the FCA," but provides no authority for this proposition. (*Id.*) As Plaintiffs admit, the phrase "to maintain navigation" in 33 U.S.C. § 1371(a)(2)(A) has not been construed by the courts. If the Court were to construe "navigation" as Plaintiffs propose, the force and effect of the FCA and the power it confers on the Corps in its operation of the Missouri River would be nonexistent. There is no evidence that Congress intended such a result. In fact, it appears that Congress failed to envision this exact situation, of a state water quality enforcement action against the Government, in its operation of a major interstate river system. Therefore, the Court declines to accept Plaintiffs' proposition, and instead construes the FCA and the CWA consistently.

C. Other Considerations

The Court is also persuaded by the principles of preemption. When federal and state laws conflict, the Supremacy Clause requires that the federal law prevail. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963). Even

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requires absolute compliance by the Corps, in the controlled operation of a major river system that runs through many states.

though North Dakota enacted its state water quality standards pursuant to federal law, its state laws must comport with federal law. "Preemption . . . will arise when state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941) (citations omitted). Requiring the Corps to comply with North Dakota's water quality standards irrespective of the Corps' other obligations and existing river conditions circumvents the intention of Congress in its enactment of the FCA and the CWA. The Court cannot order that the Corps to violate its federal statutory obligations to comply with a state water quality standard.

The Missouri River basin has been plagued by a prolonged drought, and as evidenced by this litigation, the Corps' ability to fully provide for all of the competing basin interests has been difficult. North Dakota is attempting to put its interest above the other interests in the Missouri River basin. Common sense, above all else, cannot permit such litigation to succeed. Permitting this litigation would undoubtedly result in each state along the Missouri River seeking to enforce its own water quality standards. The Court is not in the position to determine which state's water quality standards prevail over the other. The operation of the Missouri River cannot be controlled by state water quality standards alone. The Corps' operation of the Missouri River must be examined in its entirety, together with all of the competing interests. As the parties are well aware, that issue is currently before the Court. Requiring that the Corps always comply with North Dakota's state water quality laws in its operation of the Missouri River impairs the Corps' ability to maintain navigation, and its ability to comply with the FCA. Therefore, the Court

grants the Corps' Motion to Dismiss North Dakota's Complaint.

Additionally, because there remains no case or controversy for the Complaints in Intervention, the Complaints of South Dakota and Nebraska are also dismissed. The Court believes that the claims filed by South Dakota and Nebraska in the related cases will sufficiently provide an avenue for relief. Nebraska's Motion for Summary Judgment is thus moot. Finally, although North Dakota filed a Motion to Amend its Complaint in this action, based on the foregoing, this Motion is also moot.

Accordingly, based on all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. The Corps' Motion to Dismiss North Dakota's Complaint (Clerk Doc. No. 60) is **GRANTED**;

2. The Corps' Motions to Dismiss the Complaint of Intervenors Nebraska and South Dakota (Clerk Doc. No. 49) are **GRANTED**;

3. Nebraska's Motion for Summary Judgment (Clerk Doc. No. 76) is **DENIED** as moot;

4. North Dakota's Motion for Partial Summary Judgment (Clerk Doc. No. 79) is **DENIED** as moot; and

5. North Dakota's Motion to Amend its Complaint (Clerk Doc. No. 99) is **DENIED** as moot.

LET JUDGMENT BE ENTERED ACCORDINGLY.

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270 F.Supp.2d 1115

United States District Court,
D. North Dakota,
Southwestern Division.
State of NORTH DAKOTA, et al., Plaintiffs,
and
State of South Dakota, and State of Nebraska, et al.,
Plaintiffs/Intervenors,
v.
The UNITED STATES ARMY CORPS OF ENGINEERS,
et. al., Defendants.
No. A1-03-050.

July 14, 2003.

Dean J. Haas, Lyle Gregory Witham, Attorney General's Office, Civil Litigation, Bismarck, ND, for plaintiffs.

Daniel W. Pinkston, U.S. Department of Justice, Environmental Defense Section, Denver, CO, Cameron W. Hayden, U.S. Attorney's Office, Bismarck, ND, Fred R. Disheroon, U.S. Department of Justice, Environment and Natural Resources, Washington, DC, for defendants.

Daniel H. Israel, Boulder, CO, for amicus.

Clark Jay Bormann, Bormann Law Office, Bismarck, ND, David D. Cookson, Nebraska Atty Gen's Office, Lincoln, NE, John P. Guhin, Attorney General's Office, Pierre, SD, for intervenor.

MEMORANDUM AND ORDER DENYING NORTH DAKOTA'S MOTION FOR A PRELIMINARY INJUNCTION

HOVLAND, Chief Judge.

I. *PROCEDURAL HISTORY*

This case arises out of the management and operation of the Missouri River and its attendant reservoirs. The matter before the Court is the State of North Dakota's Motion for a Preliminary Injunction. North Dakota seeks a preliminary injunction order stating:

> that the Corps maintain a minimum cold water habitat in Lake Sakakawea of 200,000 acre-feet through September 30, 2003. The particular way to achieve the minimum 200,000 acre-feet should be left, however, to the Corps' management and discretion.
>
> That a Special Master be appointed by the Court to monitor compliance with the order throughout the summer, and to make recommendations to the Court to address any changes or adjustments that may be needed based on higher or lower flows than anticipated in the Corps' June 1, 2003 forecast, or to address any unanticipated downstream impacts.

On May 7, 2003, the Court extended an Ex Parte Temporary Restraining Order entered on April 29, 2003, by state district court Judge Gail Hagerty. On May 16, 2003, the Court again extended the Ex Parte Temporary Restraining Order until the end of May based on the consent of the Corps of Engineers, modified the Order to allow a maximum daily average release of 21,500 cfs from Garrison Dam, and suspended the requirement that the Corps of Engineers submit a compliance plan by May 19, 2003. On May 29, 2003, the Court granted the Corps of Engineers' Motion to Dissolve the Ex Part Temporary Restraining Order. On June 4, 2003, the Court held a hearing on both North Dakota's and South Dakota's

Motions for Preliminary Injunctions, at which the parties submitted additional evidence and the Court heard testimony from several witnesses. The same day, June 4, 2003, the Eighth Circuit released its opinion in *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir.2003).[1]

This matter comes before the Court with a complex and lengthy history involving the dispute between the Corps of Engineers and the various Missouri River Basin states regarding the management of the Missouri River. A more extensive review of the background of the case is set forth in the Court's Orders of May 16, 2003, and May 29, 2003. However, a brief summary is necessary to provide the backdrop to North Dakota's Motion for a Preliminary Injunction.[2]

II. *BACKGROUND*

On February 20, 2003, the North Dakota Department of Health issued a "Notice of Violation" to the Corps of Engineers alleging continuing violations and actions that threatened to violate North Dakota's water quality standards applicable to Garrison Dam and Lake Sakakawea. The Notice of Violation indicated that the North Dakota Department of Health may file suit against the Corps of

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[1] The Eighth Circuit combined several appeals involving the Missouri River and issued one opinion resolving the following cases: *State of South Dakota, et al. v. Ubbelohde, et al.*, No. 01-2133SD; *State of South Dakota, et al. v. Ubbelohde*, No. 02-2144SD; *State of South Dakota, et al. v. Ubbelohde, et al.*, No. 02-2185SD; *State of South Dakota, et al. v. Ubbelohde, et al.*, No. 02-2187SD; *State of Nebraska, et al. v. Ubbelohde, et al.*, No. 02-2191NE; *State of North Dakota, et al. v. Ubbelohde, et al.*, No. 02-2305ND.

[2] A Motion for Preliminary Injunction has also been made by South Dakota, and it will be the subject of a separate order.

Engineers. In essence, the Notice of Violation asserted that the Corps' management of Lake Sakakawea constitutes a form of "pollution" under state law which would threaten the lake's cold water fishery by decreasing the lake's water elevation.

The State of North Dakota filed a complaint in state district court on April 29, 2003. In its complaint, the State alleged that the Corps of Engineers violated North Dakota's water quality standards in Lake Sakakawea through its operation of the Garrison Dam. It is alleged in the complaint, and the state district court found in its TRO, that Section 313(a) of the federal Clean Water Act constitutes a waiver of sovereign immunity, thus allowing states to sue federal entities for alleged violations of state water quality standards. *See* 33 U.S.C. § 1323(a). In essence, the State of North Dakota alleges that the Corps management of water levels in Lake Sakakawea during the summer months will violate North Dakota's water quality standards as it relates to the maintenance of a cold water fishery in Lake Sakakawea.

The State of North Dakota contends that the Corps of Engineers' management of the Missouri River Mainstem Reservoir System, and particularly the management of the release of waters from Garrison Dam, constitutes a form of "pollution" because it is a "man-made or man-induced" change that has altered the physical, chemical, and biological integrity of Lake Sakakawea. According to the State, adherence to the Corps of Engineers' April 1, 2003, and May 1, 2003, projected forecast and its current Annual Operating Plan will result in no cold water fish habitat remaining in Lake Sakakawea by the end of the summer of 2003. However, based on the June 1, 2003, forecast, approximately 173,340 acre-feet of cold water habitat

would remain at the end of September 2003. *It is undisputed that at the present time, no specific violations of North Dakota law or of water quality regulations have occurred.*[3]

The State of North Dakota is seeking injunctive relief to (1) maintain a minimum cold water habitat in Lake Sakakawea of 200,000 acre-feet through September 30, 2003; and (2) to appoint a Special Master to monitor compliance with the preliminary injunction throughout the summer. North Dakota contends that the survival of the cold water fishery in Lake Sakakawea this summer is dependent upon (1) the average elevation of Lake Sakakawea in May before it stratifies; and (2) the amount that inflow into the lake exceeds outflow during the months of June, July, and August. The first factor is now moot because the State's initial concern about maintaining the average elevation of Lake Sakakawea in May before it stratified has been addressed. Thus, the issue of whether to grant a preliminary injunction focuses on the amount of inflow and outflow at Lake Sakakawea for the remainder of the summer months.

Since the original filing in North Dakota state district court, the case was removed to federal district court, and the States of Nebraska and South Dakota have been allowed to intervene. To summarize the current litigation,

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[3] Although the State of North Dakota characterizes the Corps' actions as constituting "apparent continuing violations," in its Notice of Violation the State uses language that refers to future violations rather than current violations; for example "will likely cause," "likely to cause," and "will likely occur." At the June 4, 2003, hearing Mike Sauer of the North Dakota Department of Health conceded that the Corps was not currently violating North Dakota water quality standards.

North Dakota seeks injunctive relief that would limit releases from Garrison Dam throughout the summer of 2003. South Dakota wants the Court to order that water elevations in other mainstem reservoirs not be lowered in order to raise the elevation of Lake Sakakawea and specifically wants to prevent the lowering of water elevations in Lake Oahe. The State of Nebraska wants the Corps of Engineers to comply with the 2003 Annual Operating Plan forecast which means drawing down the water levels from the upper reservoirs throughout the summer to support the Endangered Species Act, navigation, and other downstream needs. The diverse interests of the states and their needs for adequate water levels in the Missouri River and its reservoirs come at a time when this region of the country is experiencing its fourth year of drought conditions.

III. *LEGAL DISCUSSION*

In determining whether preliminary injunctive relief should issue, the Court is required to consider the factors set forth in *Dataphase Systems, Inc. v. C.L. Sys. Inc.*, 640 F.2d 109, 114 (8th Cir.1981) (*en banc*). The Eighth Circuit summarized those factors as follows:

> When considering a motion for a preliminary injunction, a district court weighs the movant's probability of success on the merits, the threat of irreparable harm to the movant absent the injunction, the balance between harm and the injury that the injunction's issuance would inflict on other interested parties, and the public interest. *Dataphase Systems, Inc. v. C.L. Sys, Inc.*, 640 F.2d 109, 114 (8th Cir.1981) (*en banc*). We reverse the issuance of a preliminary injunction only if the issuance "is the product of an abuse of discretion or misplaced reliance on an erroneous legal

> premise." *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 556 (8th Cir.1993) *cert. denied* 512 U.S. 1236, 114 S.Ct. 2741, 129 L.Ed.2d 861 (1994).

Pottgen v. Missouri State High School Activities Association, 40 F.3d 926, 929 (8th Cir.1994).

The burden of establishing the necessity of a preliminary injunction is on the movant. *Baker Electric Co-op. Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir.1994); *Modern Computer Systems, Inc. v. Modern Banking Systems, Inc.*, 871 F.2d 734, 737 (8th Cir.1989) (*en banc*). "No single factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they weigh towards granting the injunction." *Baker Electric Co-op*, 28 F.3d at 1472 (quoting *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir.1987)). The granting of a preliminary injunction is an extraordinary remedy and the right to such relief must be clearly established by the movant. *Brookins v. Wissota Promoters Ass'n, Inc.*, 142 F.Supp.2d 1149, 1151 (D.N.D.2000). The Court will address each of the *Dataphase* factors.

A. *PROBABILITY OF SUCCESS ON THE MERITS*

To succeed on the merits, North Dakota must clear several hurdles including issues pertaining to the availability of judicial review, sovereign immunity, and the application of water quality standards.

1. *AVAILABILITY OF JUDICIAL REVIEW*

In prior litigation between various Missouri River Basin states and the Corp of Engineers, the Corps has argued that federal district courts lacked jurisdiction to review management decisions of the Corps because these decision were "committed to agency discretion by law" under 5 U.S.C. § 701(a)(2). *See e.g.*, Brief of Appellant, p. 23, *State of North Dakota v. Ubbelohde*, No. 02-2305. This very issue was recently resolved by the Eighth Circuit Court of Appeals in the case of *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir.2003), a decision issued on June 4, 2003.

In *South Dakota v. Ubbelohde*, the Eighth Circuit directly addressed the issue of whether the Corps of Engineers' actions are subject to judicial review. The Eighth Circuit rejected the Corps of Engineers' argument that its actions are not subject to judicial review and held that the Corps' actions are constrained both by the Flood Control Act of 1944 and the Master Manual. 330 F.3d 1014, 1027-1029. The Eighth Circuit concluded that courts could (1) review the Corps of Engineers' compliance with the Flood Control Act which mandates the Corps must consider the various interests (flood control, navigation, recreations, and other interests) before making a decision, and (2) review the Corps' compliance with the Master Manual which directs the operation of the Missouri River.

Here, the State of North Dakota's claim is based on a different theory and body of law than its previous claim, although the relief the State seeks appears to be nearly identical. North Dakota's current claim is based on the Corps' alleged violation of the federal Clean Water Act and North Dakota water quality standards rather than on the

Corps' alleged violation of the Flood Control Act or the Master Manual. Thus, although it provides substantial guidance, the *South Dakota v. Ubbelohde* decision is not dispositive as to the issue of availability of judicial review.

The Ninth Circuit has held that "[u]nder the Clean Water Act, all federal agencies must comply with state water quality standards. . . . 33 U.S.C. § 1323(a). Judicial review of this requirement is available under the Administrative Procedure Act." *Oregon Natural Resources Council v. United States Forest Service*, 834 F.2d 842, 852 (9th Cir.1987); *see also National Wildlife Federation v. United States Army Corps of Engineers*, 132 F. Supp 2d 876, 878 (D.Or.2001) (finding that the court had jurisdiction to review claims that the Corps was "violating the Clean Water Act by not complying with the water quality standards of the State of Washington").[4] Thus, it appears the Corps' compliance with the Clean Water Act is subject to judicial review.

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[4] The contrary conclusion was reached by a Pennsylvania district court when environmental groups sought to force the Corps to comply with the Water Resources Development Act of 1990, which set forth the general directive that "environmental protection [shall be included] as one of the primary missions of the Corps of Engineers in planning, designing, constructing, operating, and maintaining water resource projects." *See Raymond Proffitt Foundation v. U.S. Army Corps of Engineers*, 175 F.Supp.2d 755, (E.D.Pa.2001) (holding that because "[t]he text of § 2316 provides only a general statement that established environmental protection as one of the Corps' primary missions [and] gives no guidance on how this mission is to be carried out . . . § 2316 falls under the § 701(a) exception for cases where 'agency action is committed to agency discretion by law' [and thus, is not capable of review by a court]").

2. *SOVEREIGN IMMUNITY*

The next hurdle the State of North Dakota must clear involves the Corps of Engineers' claim of sovereign immunity. North Dakota argues that Section 313 of the Clean Water Act [33 U.S.C. § 1323] constitutes a waiver of sovereign immunity. Section 313 of the Clean Water Act provides, as follows:

> (a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.

For additional support, North Dakota cites to *National Wildlife Federation v. United States Army Corps of Engineers*, 92 F.Supp.2d 1072, 1081 (D.Or.2000), where the court found that "[u]nder the Clean Water Act, all federal agencies must comply with state water quality standards" and to Executive Order 12088, 43 Fed.Reg. 27,707 (Oct. 12, 1978), where President Carter ordered executive agencies to comply with the Clean Water Act as well as other federal environmental standards.

North Dakota also refers the Court to the legislative history of Section 313 of the Clean Water Act. The Clean

Water Act was amended in 1977 in response to an Eighth Circuit decision, *Minnesota v. Hoffman*, 543 F.2d 1198 (8th Cir.1976), *cert. denied*, 430 U.S. 977, 97 S.Ct. 1672, 52 L.Ed.2d 373 (1977), which held that the Corps of Engineers was exempt from Sections 313 and 404 of the Clean Water Act when conducting dredging activities. A portion of the Clean Water Act's legislative history states:

> The act has been amended to indicate unequivocally that all Federal facilities and activities are subject to all of the provisions of State and local pollution laws. Though this was the intent of Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by Federal agencies, has misconstrued the original intent.
>
> Since the substantive requirements of the act and of State and local law would be unenforceable unless procedural provision were also met, section 313 is amended to specify that, as in the case of air pollution, a Federal facility is subject to any Federal, State, and local requirement respecting the control or abatement of water pollution, both substantive and procedural, to the same extent as any person is subject to these requirements. This includes, but is not limited to, requirements to obtain operating and construction permits, reporting and monitoring requirements, any provisions for injunctive relief and such sanctions imposed by a court to enforce such relief, and the payment of reasonable service charges . . . .
>
> The amendment to section 404 clarifies the intent of Congress relative to the dredging activities of the U.S. Army Corps of Engineers to maintain navigation on the Nation's waterways

is in the national interest. However, Corps dredging activities, like any municipal or industrial discharge to the Nation's waters, or any private dredging activities, should be conducted in compliance with applicable State water quality standards. The Corps, like other Federal agencies, should be bound by the same requirements as any other discharger into public waters.

By this amendment, the committee clarifies that Corps dredging activities are not exempt from State pollution abatement requirements. In spite of language in section 313 in the Senate report on the 1972 act, that "requires every Federal agency with control over any activity or real property, to provide national leadership in the control of water pollution in such operations", the Supreme Court ruling in the Minnesota case would otherwise free corps-conducted dredging from compliance with State water quality standards. The intention of the 1972 act was not to exempt the Corps or any other public or private agency from State water quality standards and the interpretation of section 404 by the courts is at variance with the intent of Congress . . . .

This amendment to section 404 is neither intended nor expected to result in compromising the ability of the Corps to maintain navigation. The States that have taken administrative and judicial action to seek Corps compliance with water quality standards have a comparable interest in the movement of commerce on waterways maintained by corps dredging. The committee expects that such States will act both to insure compliance with water quality standards and continued corps dredging activities.

S.Rep. No. 95-370, at 68-69 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4393. North Dakota argues that Section 313 when read in conjunction with the 1977 amendments, shows that the Corps of Engineers must comply with state water quality standards. Finally, North Dakota contends that the Corps should be able to operate the Missouri River Mainstem Reservoir System in a manner that complies with both the Clean Water Act and the Master Manual.

The Corps of Engineers argues that the waiver of sovereign immunity set forth in Section 313 is not a complete waiver and specifically points to Section 511 [33 U.S.C. § 1371] which provides as follows:

> This chapter shall not be construed as
>
> (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter;
>
> (2) *affecting or impairing the authority of the Secretary of the Army*
>
> (A) *to maintain navigation* or
>
> (B) under the Act of March 3, 1899 (30 Stat. 1122); except that any permit issued under section 1344 of this title shall be conclusive as to the effect on water quality of any discharge resulting from any activity subject to section 403 of this title, or
>
> (3) affecting or impairing the provision of any treaty of the United States.

(emphasis added). The Corps of Engineers asserts that an injunction precluding necessary releases of water would

not be sufficient to provide minimum service to navigation. The Corps also characterizes the current situation as the precise type of fact pattern that Section 511 was enacted to address. The Corps acknowledges that its obligation to "maintain navigation" does not always trump the Clean Water Act. However, the Corps contends that when it is faced with what it calls an "either-or-situation," the Corps ability to maintain navigation is not subject to state water quality standards.

The Corps of Engineers also contends that the Eighth Circuit decision in *State of Missouri ex rel. Ashcroft v. Dep't of the Army*, 672 F.2d 1297 (8th Cir.1982) bars North Dakota's claims. In the *Missouri* case, the plaintiffs argued that the Corps was discharging pollutants into the Sac River through its construction and operation of a dam and power generator, and that this constituted a violation of the Clean Water Act and Missouri state water quality laws. The Eighth Circuit held that the federal Clean Water Act "subjects the Corps of Engineers to state water quality laws only if it were causing 'the discharge or runoff of pollutants.'" *Id.* at 1304. Although the *Missouri* decision may be helpful to the Corps' other arguments, the decision did not touch on issues of sovereign immunity and does not bolster the Corps' sovereign immunity argument.

While there is no question that Section 313 of the Clean Water Act [33 U.S.C. § 1323] constitutes a partial waiver of sovereign immunity, there is also no question that Section 511 [33 U.S.C. § 1371] provides sovereign immunity protection for the Corps of Engineers when compliance with the Clean Water Act may "affect or impair" the authority of the Corps of Engineers to "maintain navigation." Thus, the issue becomes whether compliance with North Dakota's water quality standards would

"affect or impair" the Corps of Engineers' ability to maintain navigation.[5] Even though the Corps has not specified how or why the relief North Dakota seeks would "affect or impair" the Corps' ability to "maintain navigation," the fact that the Corps of Engineers may be able to successfully argue it is immune from suit is a factor which weighs heavily against North Dakota's probability of success on the merits. This finding is further supported by the recent pronouncement of the Eighth Circuit Court of Appeals in *South Dakota v. Ubbelohde.*

3. *WATER QUALITY STANDARDS*

North Dakota's complaint alleges that the Corps of Engineers Annual Operating Plan (AOP) for 2003 creates violations of North Dakota's water quality laws. North Dakota's ability to enact and enforce water quality standards is outlined by the Federal Water and Pollution Control Act.

The Federal Water and Pollution Control Act, commonly referred to as the Clean Water Act, 33 U.S.C. § 1251 *et. seq.* was designed to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). The Clean Water Act provides for two primary sets of water quality measures: effluent limitations, found in 33 U.S.C. § 1311, and water quality standards, found in 33 U.S.C. § 1313.

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[5] The issue of sovereign immunity was not addressed in the Oregon case cited by North Dakota, and it is unclear whether the river system in question there was used for navigation. *National Wildlife Federation v. United States Army Corps of Engineers,* 132 F.Supp.2d 876 (D.Or.2001); *National Wildlife Federation v. United States Army Corps of Engineers,* 92 F.Supp.2d 1072 (D.Or.2000).

The effluent limitations section focuses on the control of individual discharges from "point sources" into the navigable waters. A "point source" is defined as "any discernable, confined, and discrete conveyance" such as a pipe, ditch, or conduit from which "pollutants" may be discharged in navigable waters. *See* 33 U.S.C. § 1362(14). The Clean Water Act provides that the discharge of any "pollutant" by any person shall be unlawful. The term "pollutant" is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *See* 33 U.S.C. § 1362(6). The term "pollution" as opposed to "pollutant" has a broader definition under federal law and means the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of the water." *See* 33 U.S.C. § 1362(19). The courts have determined that the release of water from dams does not equate with the addition of "pollutants" to navigable waters. *See National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C.Cir.1982); *Missouri ex rel. Ashcroft v. Dept. of the Army*, 672 F.2d 1297, 1303-1304 (8th Cir.1982). However, few courts have tackled the issue of whether the operation of dams may create "pollution."

North Dakota has not alleged that the Corps of Engineers is discharging pollutants into the Missouri River in violation of Sections 301 [33 U.S.C. § 1311] and 402 [33 U.S.C. § 1342] of the Clean Water Act. In fact, North Dakota has specifically stated that its cause of action *does not* arise under the Clean Water Act's permitting system, which regulates the discharge of pollutants

into navigable waters. *See* 33 U.S.C. §§ 1311, 1342. Although previous decisions regarding the Corps of Engineers activities as it relates to the discharge of pollutants may be somewhat analogous to North Dakota's claims, they do not resolve the question of whether the Corps of Engineers is subject to state water quality standards under Section 303 of the Clean Water Act which regulates pollution rather than the discharge of pollutants. *See e.g., State of Missouri ex rel. Ashcroft v. Dep't of the Army*, 672 F.2d 1297 (8th Cir.1982) (holding discharges from dams could not be classified as the runoff of a pollutant); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C.Cir.1982) (holding dam-induced water quality changes do not constitute "discharge of a pollutant" under 33 U.S.C. § 1362(12)).

Under Section 303, the Clean Water Act directs each state to establish its own water quality standards subject to the procedures set forth in federal statutes and regulations. *See* 33 U.S.C. § 1313. State water quality standards must contain three elements, (1) designated uses, (2) numeric or narrative water quality criteria, and (3) antidegradation rules. 40 C.F.R. § 131.6(a), 136.11(a)(1), 131.11(b)(1) and (b)(2), 131.6(d), 131.12. There is no mechanism in the Clean Water Act for the enforcement of water quality standards adopted by the states; rather the enforcement is left to the states.

On March 27, 2003, North Dakota Governor John Hoeven signed an emergency bill amending North Dakota's water quality statute which enabled this action to be brought by the State. Section 61-28-06(1) of the North Dakota Century Code as amended states in relevant part as follows:

1. It shall be unlawful for any person:

a. To cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any waters of the state; and

b. To discharge any wastes into any waters of the state *or to otherwise cause pollution* which reduces the quality of such waters below the water quality standards established therefor by the department.

The statute also provides that:

3. Notwithstanding any other provisions of this chapter, and except as in compliance with the provisions of this chapter, and any rules and regulations promulgated hereunder, the discharge of any wastes *or the violation of any water quality standards,* by any person shall be unlawful. *The department may seek injunctive relief for a threatened or continuing violation of a water quality standard, including any violations of the narrative standards, if the department determines that the violation will substantially interfere with or cause or threaten to cause long-term or irreparable harm to waters of this state that the department determines has statewide or regional significance or has a substantial impact to a local community. The authority to seek injunctive relief for a violation of the water quality standards, including violations of the narrative standards, is limited to the department, after obtaining written approval of the governor, and may not be enforced by any other person.*

N.D.C.C. § 61-28-06(3) (amending language underlined). "Person" is defined in the statute to include "*any state or*

federal agency or entity responsible for managing a state or federal facility." N.D.C.C. § 61-28-02(5). "Pollution" is defined as "the manmade or man-induced alteration of the physical, chemical, biological, or radiological integrity of any waters of the state." N.D.C.C. § 61-28-02(7). This is virtually the same definition of "pollution" found in the federal Clean Water Act. North Dakota's regulatory schemes are also similar to the anti-pollution laws and regulations of each of the states that border the Missouri River.

A review of litigation involving the Corps of Engineers and its operations of dams reveals few situations where states have attempted to enforce their water quality standards, but at least one other federal district court has grappled with an alleged violation of state water quality standards by the Corps of Engineers.[6] In *National Wildlife Federation v. United States Army Corps of Engineers*, 132 F.Supp.2d 876, 878 (D.Or.2001), the Federal District Court for the District of Oregon found it had jurisdiction to review claims that the Corps of Engineers was "violating the Clean Water Act by not complying with the water quality standards of the State of Washington" and cited to a line of Ninth Circuit opinions to supports its conclusion. *Id.* at 889 (citing *Idaho Sporting Congress v. Thomas*, 137

[6] The concept that state water quality standards should apply to the activities of the Corps of Engineers was noted in *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 182 (D.C.Cir.1982), where the court stated that statewide water quality plan may be the better regulatory tool to address "dam-caused pollution." The court also noted that new dams cannot be built unless they comply with state water quality standards and cited to an example in South Carolina where the Corps of Engineers agreed to meet state water quality standards and include a method to remedy anticipated low dissolved oxygen problems in its construction plan for a new dam. *Id.* at 183 n. 78.

F.3d 1146, 1153 (9th Cir.1998); *Oregon Natural Resources Council v. Lyng*, 882 F.2d 1417, 1424 (9th Cir.1989); *Oregon Natural Resources Council v. United States Forest Service*, 834 F.2d 842, 848 (9th Cir.1987)).

In *National Wildlife Federation*, various environmental groups from Oregon and Washington filed suit against the Corps of Engineers alleging that the actions of the Corps in operating four dams on the Lower Snake River violated the Clean Water Act. The Lower Snake River runs through the southeast corner of the State of Washington, and empties into the Columbia River near Kennewick, Washington. The Corps of Engineers owns and operates four power projects and dams – Ice Harbor, Lower Monumental, Little Goose, and Lower Granite – as part of the Federal Columbia River Power System. *National Wildlife Federation v. United States Army Corps of Engineers*, 92 F.Supp.2d 1072, 1074 (D.Or.2000). The plaintiffs alleged that the water quality standard violations constituted "serious, long-standing, and ongoing violations of federal law that have degraded water quality, impaired beneficial uses, and pushed imperiled salmon and steelhead species to the brink of extinction." *Id.* The Corps responded by arguing that (1) it attempted to comply with state water quality standards, (2) its decisions regarding compliance with water quality standards were reasonable, and (3) any temperature exceedences were not caused by the Corps of Engineers' operation of the dams, but rather were caused by the fact that the dams existed. 132 F.Supp.2d 876, 888-92.

The court stated it must determine whether the actions of the Corps of Engineers were arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. 132 F.Supp.2d 876, 878-79. "In determining whether

the Corps' decision . . . regarding the operation of the dams were arbitrary and capricious, the court must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Id.* at 879. The court reviewed portions of the administrative record available and found that it was "not possible to conclude that the Corps complied with its legal obligations under the Clean Water Act when it made the decisions . . . based upon a review of the decisions themselves." *Id.* at 890.

The court rejected an argument by the Corps of Engineers that it was not able to comply with Washington water quality standards because of the Endangered Species Act and stated "the Endangered Species Act and the Clean Water Act 'should be read together, so that compliance with one statute does not come at the expense of the other.'" *Id.* at 891. The court ultimately found that the Corps had not complied with its legal obligations under the Clean Water Act because it had not considered all the relevant factors. *Id.* at 895. The court concluded by stating that since the claim was not an enforcement action under the Clean Water Act, the proper remedy was to remand the matter back to the agency for additional investigation and explanation. *Id.* at 895.

North Dakota's claims are similar to those asserted by the plaintiffs in *National Wildlife Federation*. North Dakota asserts that the Corps of Engineers must comply with the Clean Water Act and state water quality standards. Just as in *National Wildlife Federation*, North Dakota contends the Corps of Engineers' management decisions have resulted in alleged violations of North Dakota water quality standards. At the outset, it appears the *National Wildlife Federation* decision would support

North Dakota's motion for a preliminary injunction, but a closer look reveals that North Dakota has failed to set forth a case that is likely to succeed on the merits.

Although this action is in the early stages of litigation, North Dakota has not attempted to show whether the Corps of Engineers sought to comply with the Clean Water Act and state water quality standards or whether the Corps of Engineers considered the effect its 2003 Annual Operating Plan would have on the Clean Water Act and state water quality standards. Instead, North Dakota has alleged *future* violations of the Clean Water Act and state water quality standards. North Dakota's failure to show either how the Corps of Engineers failed to "consider the relevant factors" when making its operational decisions for 2003 *or* how the Corps of Engineers is currently in violation of the Clean Water Act or state water quality standards weighs against its success on the merits because North Dakota has not set forth sufficient evidence to show the Corps of Engineers acted in an arbitrary or capricious manner – the standard for such an action.

In addition, the enforcement of North Dakota's water quality standards cannot be considered in a vacuum. One significant difference between the *National Wildlife Federation* case and the current litigation is that the *National Wildlife Federation* case involved a series of dams which were all located in the same state, thus requiring the enforcement of only one set of water quality standards. In the present action, when the Corps of Engineers allegedly causes violations of North Dakota's water quality standards, and water levels are held back to protect the cold water fishery and the biological integrity of Lake Sakakawea, then other downstream states may assert similar violations of their respective water quality

standards. Nebraska and South Dakota have already intervened in this action to protect their own interests, which to this point have not proven to be completely congruent with North Dakota's. Thus, the complexity of the issues present in North Dakota's claim to enforce its water quality standards appears to lessen the probability of North Dakota's success on the merits.

Finally, the Corps of Engineers asserts North Dakota has not properly promulgated the standards it has used to calculate the harm to Lake Sakakawea's cold water fishery – namely the use of a 15 degree Celsius and 5 milligrams per liter of dissolved oxygen criteria in calculating the size of the cold water fish habitat. The Corps contends that the 800,000 acre-feet long-term harm threshold and the 200,000 acre-feet irreversible harm threshold advanced by North Dakota are not based on administratively established criteria and do not constitute requirements within the meaning of Section 313(a) of the Clean Water Act. The Corps contends that North Dakota has not adopted the specific temperature and dissolved oxygen levels it used to calculate the 800,000 and 200,000 acre-feet thresholds. As a result, the Corps argues that it had no way of knowing that its operations could potentially violate North Dakota water quality standards.

North Dakota responds by stating that Lake Sakakawea is classified as a Class 1 Lake under North Dakota Administrative Code provisions. N.D. Admin. Code § 33-16-02.1, App. II. The characteristics of a Class 1 Lake include "waters capable of supporting growth of salmonid fishes and associated aquatic biota" and "cold water fishery." N.D. Admin. Code § 33-16-02.1-09(1)(f). North Dakota correctly asserts that narrative standards are just as enforceable as numeric standards and cites to *PUD No.*

1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700, 716, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994). North Dakota also contends it is absurd for the Corps to argue that it had no knowledge that a cold water fishery thrives at water temperatures below 15 degrees Celsius with a dissolved oxygen content of 5 milligrams per liter. North Dakota submitted several Corps publications discussing precisely such parameters for a cold water fishery.

The Court acknowledges that there are some questions surrounding the sufficiency of North Dakota's published water quality standards, including whether the Corps received proper notice of what North Dakota considered the specific numeric standards necessary for "waters capable of supporting growth of salmonid fishes and associated aquatic biota." However, the Corps of Engineers' argument that it had no idea what the parameters are necessary to sustain a cold water fishery is not credible. Clearly, the Corps of Engineers knew that a cold water fishery needs a water temperature of somewhere between 15 to 20 degrees Celsius and a dissolved oxygen content of near 5 milligrams per liter – the Corps itself has published materials referencing such standards. What is not clear is whether the Corps attempted to comply with North Dakota water quality standards or whether the Corps even considered North Dakota's water quality standards when deciding how to operate the Missouri River Mainstem Reservoir System. Again, the uncertainty surrounding such issues does not weigh in North Dakota's favor when considering its success on the merits of the underlying action.

In summary, North Dakota's probability of success on the merits appears unlikely. Although some of the jurisdictional issues raised in prior Missouri River litigation have been resolved by the recent Eighth Circuit opinion, the issue of sovereign immunity looms large in this case. To be successful on its claim that the Corps of Engineers violated the Clean Water Act, North Dakota must show that the Corps acted in an "arbitrary and capricious" manner when deciding how to operate the Missouri River Mainstem Reservoir System. Although the Corps of Engineers has been held liable for non-compliance with state water quality laws in one other reported decision, the courts have yet to see one state along a major river system comprised of several dams and reservoirs spread over many states succeed in a state water quality standards enforcement action. The Court finds that this particular *Dataphase* factor, i.e. "the likelihood of success on the merits," does not weigh in North Dakota's favor.

B. *THE THREAT OF IRREPARABLE HARM*

The State of North Dakota alleges that the Corps of Engineers management of water levels in Lake Sakakawea during the next several months will violate North Dakota's water quality standards and harm the cold water fishery in Lake Sakakawea. According to North Dakota, adherence to the Corps of Engineers' April 1, 2003, projected forecast and its current Annual Operating Plan will result in no cold water fish habitat remaining in Lake Sakakawea by the end of the summer of 2003.

North Dakota contends that if the volume of cold water fish habitat in Lake Sakakawea falls below 800,000 acre feet, the Corps of Engineers would violate North

Dakota's water quality standards. North Dakota also argues that if the volume of the cold water fish habitat in lake Sakakawea falls below 200,000 acre feet the survival of the cold water fishery is threatened. North Dakota acknowledges that "this does not mean that a major coldwater fishery die-off will occur at 200,000 acre-feet, but it is possible, and the possibility grows as the volume of cold water fish habitat continues to fall below this level." North Dakota suggests that by maintaining 200,000 acre-feet of cold water habitat, the irreparable harm North Dakota will suffer would be avoided. North Dakota also submits that this remedy could be achieved with adequate support for all system uses except navigation.

The Corps of Engineers responds by contending that none of the plaintiffs have made any factual showing of an actual violation of a water quality standard. Thus, the Corps argues that it is inappropriate to provide injunctive relief before a violation of any water quality standards has been established. The Corps of Engineers concludes by noting that increased precipitation or other events could lead to a situation in which North Dakota could concede that its water quality standards have not been violated.

As the Eighth Circuit Court of Appeals noted last month in *South Dakota v. Ubbelohde,* and this Court specifically finds, all sides to this dispute seem to agree that each of the states can show that they will suffer irreparable harm absent the injunctions sought. It has become clear that protecting one state's interests from irreparable harm appears to ensure another state's interests will suffer irreparable harm. Nevertheless, North Dakota has shown it will suffer the threat of irreparable harm, and the Court finds that this *Dataphase* factor weighs in North Dakota's favor.

C. *BALANCE OF PARTIES' INTERESTS AND PUBLIC INTEREST*

For purposes of this case where all of the parties are governmental entities, the balancing of harms between the parties and the consideration of the public interest are essentially the same and will be discussed together. North Dakota, South Dakota, Nebraska, and the Corps of Engineers have provided the Court with extensive evidence and documentation showing the varying interests each has in the Missouri River. Each is summarized below.

1. *NORTH DAKOTA'S INTERESTS*

Garrison Dam was completed in 1954 and is the largest dam in the mainstem system. Lake Sakakawea is the reservoir created by Garrison Dam. Garrison Dam has a storage capacity of 23.8 million acre feet (MAF), or approximately 33% of the total storage of the Missouri River Mainstem Reservoir System, 1,300 miles of shoreline, and is approximately 178 miles long. Lake Oahe, which extends into North Dakota from a dam located in South Dakota, has a storage capacity of approximately 23.1 million acre-feet of water, or approximately 31% of the total storage capacity of the Mainstem Reservoir.

North Dakota surrendered 550,000 acres of land for the construction of Garrison Dam and Lake Sakakawea. In return, North Dakota was promised hydro-electric power, most of which goes out of state, water for irrigation, which has gone largely unfunded by Congress, and the Garrison Diversion Project, which was scrapped. As one writer has noted, the "consolation prize" North Dakota received was a world class sport fishery. Brian Morris, *Unanswered Prayers: The Upper Missouri River Basin*

States Take on the U.S. Army Corps of Engineers, 68 N.D. L.Rev. 897 (1992). This sport fishing industry was largely developed through the fish stocking efforts of the North Dakota Game and Fish Department. Garrison Dam National Fish Hatchery located at the base of the dam is the largest walleye and northern pike producing facility in the world.

The State of North Dakota contends that the Corps of Engineers has continually favored a dwindling downstream navigation industry over the growing upstream recreational industry, which in turn has threatened North Dakota's fishery. North Dakota officials contend that the economic benefits of downstream navigation have a value of $1-2 million as compared to a $65 million fishing and tourism industry upstream in North Dakota. (Docket No. 2, Schultz Aff., at 2-3). The economic value of Lake Sakakawea as a fishery alone is calculated to be at least $23 million a year. (Docket No. 2, Hendrickson Aff., at 2)

In 2000, 750,000 walleye were caught and 500,000 were harvested from Lake Sakakawea. Lake Sakakawea's salmon fishery generated approximately 95,600 angler hours and a catch of 17,600 salmon in 2000. (Docket No. 17, Power Aff., at 3; Docket No. 2, Lee Aff., at 2). The salmon fishery is the only source of disease free salmon in North America. North Dakota argues that if this salmon fishery is lost it would be impossible to replace. (Docket No. 2, Lee Aff., at 2). Three state parks located near the shores of Lake Sakakawea hosted 494,000 visitors in 2000. (Docket No. 2, Testimony of North Dakota Governor John Hoeven, October 23, 2002, hearing before the Corps of Engineers). A crash in the fish population is expected to result in a 73% decrease in anglers which correspond to a

$17.3 million yearly economic loss until the fishery can be restored. (Docket No. 2, Schultz Aff., at 6).

2. *SOUTH DAKOTA'S INTERESTS*

South Dakota's interests and its position in this litigation are very similar to North Dakota's. South Dakota maintains that the Corps manages the Missouri River in a fashion that favors navigation at the expense of upstream fisheries. South Dakota attacks the barge industry by alleging that it operates at only 12.5% of 1939 predictions. South Dakota also points out, as did North Dakota, that the barge industry is responsible for only $1-2 million in yearly economic production. (Docket No. 40, Exhibit L, Testimony of Dr. C. Phillip Baumel).

South Dakota's reservoirs are also nationally recognized walleye fisheries. Recreational fishing on these lakes and the Missouri River in South Dakota generate up to $51 million in revenue each year. (Docket No. 26, Cooper Aff., at 4). The favoring of navigation has severely impacted Lake Oahe. Lake Oahe generates $20 million a year in revenues when lake levels are normal. (Docket No. 26, Cooper Aff., at 3). In 2000, Lake Oahe generated only $8.2 million in revenues. (Docket No. 26, Cooper Aff., at 7). The Corps drew down Lakes Oahe in 2002 and as a result 50% of the smelt eggs were lost. With few forage fish available the walleye population in Lake Oahe has declined and average catch weights have dropped markedly. (Docket No. 27, Nelson-Stastny Aff., at 12). Lakes Sharpe, Francis Case, and Lewis and Clark are threatened with a similar fate if the Corps continues its current management policies and the drought persists. (Docket No. 27, Nelson-Stastny Aff., at 14).

3. *NEBRASKA'S INTERESTS*

The State of Nebraska has also asserted it has a number of industries that will be seriously impacted by reduced water flows in the Missouri River this summer. These industries are estimated to provide over $424 million annual economic benefit to Nebraska. (Docket Nos. 45 and 46 Appendices, Wade Aff., at 340-43). In their pleadings on file in this dispute, Nebraska contends it has power plants that rely on the Missouri River to operate within federal standards, and unless water is available at certain minimum levels, four nuclear power plants may not be able to operate. (Docket No. 11, Patterson, Aff., at 4-5). Nebraska also argues there will be significant harm to the water supplies of municipalities and a resulting increase in treatment costs with reduced flows. Nebraska has a vibrant fishing and recreational industry which will be impacted by reduced flows this summer. (Docket No. 11, Patterson Aff., at 6). Nebraska contends there will be reduced economic activity associated with low flow conditions that may result in lost tax revenues in excess of millions of dollars. Nebraska has its own regulatory schemes for water quality and anti-pollution laws and regulations and with diminished water flows, there will be an increase in water temperature which will alter the chemical and biological characteristics of the water with resulting violations of Nebraska's laws and regulatory schemes. (Docket No. 9, Esseks Aff., at 2-3). The City of Omaha relies on the Missouri River for water and recreation, as do other large cities in bordering Iowa and Missouri. Finally, Nebraska states there are 71 recreational areas located between Sioux City, Iowa, and the mouth of the Missouri River that will be significantly impacted by

reduced flows this summer. (Docket No. 11, Patterson Aff., at 6).

4. *CORPS OF ENGINEERS' INTEREST*

The Corps of Engineers argues its interests are similar to the public interest. The Corps asserts that the public interest is best met if the Missouri River Mainstem Reservoir System is operated in accordance with a considered and carefully developed plan. The Corps dismisses the interests of each states as "parochial."

Just as the irreparable harm analysis revealed, each state has significant economic, environmental, and recreational interests in the Missouri River. For each compelling argument advanced by a particular state, there is an equally compelling argument presented by another state. As the Court has stated before, this matter cannot simply be resolved by tallying the alleged economic impact and favoring the state with the largest investment. Because of the complexity of each state's interests, no state's interests clearly outweigh the others. The Court finds the *Data-phase* factors of balancing the parties interests and consideration of the public interest do not weigh in favor of any particular party to this litigation.

IV. *CONCLUSION*

This Court is very cognizant of the importance of Lake Sakakawea to the State of North Dakota, and particularly the importance to the fishing, recreation, and tourism industries. Garrison Dam, Lake Sakakawea, and the Missouri River are of vital importance to the State of North Dakota. Unfortunately, Mother Nature has not been

kind and we are now experiencing the fourth year of a significant drought in the Missouri River Basin. Hopefully, the last month of rain, combined with increased snow melt from the mountains in Montana, signals an end to the drought. The sharply divergent interests of the many states that are affected by the Corps of Engineers' plans for operation of the Missouri River Mainstem Reservoir System have again resulted in a multitude of lawsuits filed in federal courts throughout the region.

The operation of the Missouri River Mainstem Reservoir System is a complex task. The Corps of Engineers is charged with the responsibility of managing the river and its attendant reservoirs. The Corps must attempt to strike a balance among many interests, including flood control, navigation, and recreation. As the Eighth Circuit recently noted, during the good times the Corps of Engineers can accommodate all such interests, but in drought conditions, the Corps is forced to make difficult choices. Those hard choices have led to, and will continue to lead to, litigation seeking injunctions by the states which border the Missouri River from Montana to Missouri.

The operation of the Missouri River is significantly effected by natural forces as well as by the Corps of Engineers in the manipulations of the available water. The recent pronouncement from the Eighth Circuit makes it expressly clear that the Corps is required to follow the Master Manual and its Annual Operating Plan. The Corps is not free to ignore the Master Manual and federal courts can review the Corps of Engineers' actions to ensure conformity with the Master Manual. Thus, the Eighth Circuit has established a standard for the activities and operations of the Corps of Engineers in operating the

Missouri River Mainstem Reservoir System that this Court is obligated to follow.

The June 4, 2003, decision of the Eighth Circuit in *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir.2003) seems to refute the notion that North Dakota's water quality standards should control the management and operations on the Missouri River. The Eighth Circuit has granted considerable discretion to the Corps and this Court is reluctant to interfere with the exercise of that discretion at this stage of the litigation. The Eighth Circuit's position of giving deference to the Corps' actions is revealed in the following language from the decision issued on June 4, 2003:

> Courts are simply not empowered to review every decision of the Corps to ensure that it maximizes the benefits of the River for all interests. Indeed, such a standard would be impossible to meet, anyway. In times of drought it is not possible for both navigation and fishery benefits to be maximized. Something has to give.

South Dakota v. Ubbelohde, 330 F.3d 1014, 1031.

The testimony presented at the hearing on June 4, 2003, revealed that the latest forecasts project that the levels on Lake Sakakawea are expected to remain fairly constant throughout the summer due to increased precipitation and favorable conditions for runoff. In the event that such conditions change and the Corps of Engineers alters its operational plans for 2003, this Court may be forced to intervene. In the event that other court orders entered in other federal or state jurisdictions strip the Corps of Engineers of its ability to objectively function as a steward of the Missouri River water flows, and the interests of upstream

water users are placed in harms way, this Court will be forced to intervene. However, after carefully considering the equitable factors that this Court is required to consider in ruling on North Dakota's Motion for Preliminary Injunction, the Court does not believe that a preliminary injunction is warranted at this stage of the litigation. The granting of a preliminary injunction is an extraordinary remedy and the right to such relief must be clearly established by the movant. It has not been clearly established in this case.

Although the irreparable harm factor weighs in North Dakota's favor, and the balance-of-harms and public interest criteria present close questions, the dispositive factor is the likelihood of success of the merits. This issue weighs against North Dakota based on the likelihood that the Corps of Engineers will be able to successfully argue it is immune from suit under Section 511 [33 U.S.C. § 1371] of the Clean Water Act. This factor also weighs against North Dakota as a result of the June 4, 2003, decision of the Eighth Circuit Court of Appeals in *South Dakota v. Ubbelohde,* 330 F.3d 1014 (8th Cir.2003). North Dakota is not entitled to a preliminary injunction at this state of the litigation.

The State of North Dakota's Motion for a Preliminary Injunction is **DENIED.** (Docket No. 2).

IT IS SO ORDERED.

264 F.Supp.2d 871

United States District Court,
D. North Dakota,
Southwestern Division.
State of NORTH DAKOTA, et al., Plaintiffs,
and
State of South Dakota, and State of Nebraska, et al., Plaintiffs/Intervenors,
v.
The UNITED STATES ARMY CORPS OF ENGINEERS, et. al., Defendants.
No. A1-03-050.

May 29, 2003.

Lyle Gregory Witham, Dean J. Haas, Bismarck, ND, for Plaintiffs/Intervenors.

Daniel W. Pinkston, U.S. Dept. of Justice, Denver, CO, Cameron W. Hayden, U.S. Attorney's Office, Bismarck, ND, Fred R. Disheroon, U.S. Dept. of Justice, Washington, DC, for U.S. Army Corps of Engineers.

Cameron W. Hayden, U.S. Attorney's Office, Bismarck, ND, Fred R. Disheroon, U.S. Dept. of Justice, Washington, DC, for David A Fastabend, Kurt F. Ubbelohde.

Daniel H. Israel, Boulder, CO, for Three Affiliated Tribes of Fort Berthold Reservation.

Clark Jay Bormann, Bormann Law Office, Bismarck, ND,David D. Cookson, Lincoln, NE, for State of Nebraska.

John P. Guhin, Attorney General's Office, Pierre, SD, for State of South Dakota.

ORDER DISSOLVING EX PARTE TEMPORARY RESTRAINING ORDER

HOVLAND, Chief Judge.

I. *PROCEDURAL HISTORY*

The matter before the Court is the Defendants' (the "Corps of Engineers") Motion to Dissolve the Ex Parte Temporary Restraining Order entered by state district court Judge Gail Hagerty, on April 29, 2003, and extended by this Court on May 7, 2003. On May 16, 2003, the Court modified the Ex Parte Temporary Restraining Order with the consent of the parties. The Ex Parte Temporary Restraining Order ("TRO") enjoined the Corps of Engineers from exceeding specified discharge rates at Garrison Dam and lowering elevation levels of Lake Sakakawea and Lake Oahe.

The State of North Dakota filed a complaint in state district court on April 29, 2003. In its complaint, the State alleges that the Corps of Engineers violated North Dakota's water quality standards in Lake Sakakawea through its operation of the Garrison Dam. *See* N.D.C.C. § 61-28-06(1)(b); N.D. Admin. Code § 33-16-02.1. It is alleged in the complaint, and the state district court found in its TRO, that Section 313(a) of the federal Clean Water Act constitutes a waiver of sovereign immunity which allows states to sue federal entities for alleged violations of state water quality standards. *See* 33 U.S.C. § 1323(a). In essence, the State of North Dakota alleges that the Corps of Engineers' management of water levels in Lake Sakakawea during the next five (5) months will violate North Dakota's water quality standards as it relates to the maintenance of a cold water fishery in Lake Sakakawea.

The April 29, 2003, Ex Parte Temporary Restraining Order (a) enjoined the Corps of Engineers from releasing water from Garrison Dam during May 2003 in excess of a daily average of 17,450 cfs and establishes specific release amounts for June August 2003; (b) ordered the Corps to submit a plan to the North Dakota state court within twenty days to achieve and maintain compliance with all North Dakota water pollution laws and water quality standards; (c) required the Corps to submit to the state court an implementation schedule for the Corps to come into compliance with North Dakota water pollution laws and water quality standards as soon as practicable; (d) prohibited the Corps from lowering the water elevation at Lake Oahe prior to a show cause hearing; and (e) ordered the Corps to show cause why the state court should not issue a preliminary injunction which specifies the amount of water which may be released by the Corps from Garrison Dam for the months of May through September 2003.

On April 30, 2003, the day following the issuance of the TRO, the Defendants removed the case to federal court. On May 6, 2003, the Corps of Engineers filed a Motion to Dissolve the Ex Parte Temporary Restraining Order. On May 6, 2003, the State of Nebraska filed a Motion to Intervene pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. South Dakota filed an identical motion on May 8, 2003. The Court granted the Motions to Intervene on May 9, 2003.

South Dakota also seeks injunctive relief to (1) prevent the Corps of Engineers from lowering water levels in other main stem reservoirs to increase the elevation in Lake Sakakawea; (2) to prevent irreparable harm under the 1944 Flood Control Act and the Administrative Procedure Act to fisheries of main stem reservoirs when the

harm is inflicted to benefit downstream navigation; and (3) to prevent lowering the elevation of Lake Oahe to the extent that it will impair the designated cold water fishery in that lake. On May 23, 2003, South Dakota filed a Motion for a Preliminary Injunction.

Nebraska has also filed a complaint against the same Defendants for alleged violations of the 1944 Flood Control Act. Nebraska asserts that the Flood Control Act

> " . . . established the hierarchy of authorized uses of the Main Stem Missouri River reservoirs. Flood control and navigation are the dominant functions of the Corps' reservoirs. Secondary uses are authorized by the FCA, provided they do not interfere with these dominant functions and lawful uses existing at the time the FCA was enacted. *See* Nebraska Complaint, ¶ 2".

In its prayer for relief, Nebraska seeks an order requiring the Corps of Engineers to operate Garrison Dam and all other federal reservoirs within this Court's jurisdiction in accordance with the Flood Control Act, the Master Manual and the Corps' Annual Operating Plan for 2003. *See* Nebraska Complaint, ¶ 9. Nebraska has also filed notice that it is requesting the Eighth Circuit stay this proceeding until a decision is issued in a pending Eighth Circuit case. Nebraska also requested an Order of Transfer from the Multidistrict Litigation Panel.

In summary, North Dakota seeks injunctive relief that would limit releases from Garrison Dam throughout the summer of 2003. South Dakota wants the Court to order that water elevations in other main stem reservoirs not be lowered in order to raise the elevation of Lake Sakakawea and specifically wants to prevent the lowering of water

elevations in Lake Oahe. The State of Nebraska wants the Corps of Engineers to comply with the 2003 Annual Operating Plan forecast which means drawing down the water levels from the upper reservoirs throughout the summer to support the Endangered Species Act, navigation, and other downstream needs. The diverse interests of the states and their needs for adequate water levels in the Missouri River and its reservoirs come at a time when this region of the country is again experiencing drought conditions.

II. *BACKGROUND*

A. *THE MISSOURI RIVER MAIN STEM DAM SYSTEM.*

The Commerce Clause confers upon Congress complete authority with regard to the regulation of navigable waters. *U.S. v. Rands,* 389 U.S. 121, 88 S.Ct. 265, 19 L.Ed.2d 329 (1967). Congress has the constitutional authority to regulate the nation's waters and it may delegate that power to a federal executive agency as it has done with the Corps of Engineers under the Flood Control Act of 1944.

Pursuant to Section 9 of the Flood Control Act of 1944, Congress authorized the construction of all but one of the Missouri River main stem dams in accordance with the "Pick Plan," a Corps of Engineers' planning document which proposed navigational improvements and flood control, and the "Sloan Plan," a Bureau of Reclamation planning document which emphasized the use of water resources for irrigation in the upper basin states. The combined plans are commonly referred to as the "Pick-Sloan Plan." The plans set forth broad goals and objectives

including flood control, hydro power, irrigation, navigation, wildlife, and recreation.

Congress authorized the Missouri River Main Stem Dam System by adopting the "Pick-Sloan Plan" in the Flood Control Act of 1944. Pursuant to this Congressional authorization, the following six (6) dams and reservoirs were constructed:

1) Fort Peck Dam (Montana) and Fort Peck Lake;

2) Garrison Dam (North Dakota) and Lake Sakakawea;

3) Oahe Dam (South Dakota) and Lake Oahe located in both South Dakota and North Dakota;

4) Big Bend Dam (South Dakota) and Lake Sharpe;

5) Fort Randall Dam (South Dakota) and Lake Francis Case;

6) Gavins Point Dam (border of South Dakota and Nebraska) and Lewis & Clark Lake.

The Missouri River is America's longest river. The Missouri River Main Stem Dam System is North America's largest reservoir system with the capacity to store 73.4 million acre-feet of water. Garrison Dam was constructed from 1947-1954. The dam is located on the Missouri River between Mercer and McLean Counties. Garrison Dam is the fifth largest dam in the United States and Lake Sakakawea, its reservoir, is the third largest man-made lake in the United States. Garrison Dam National Fish Hatchery, located at the base of the dam, is the largest walleye and northern pike producing facility in the world.

Lake Sakakawea extends approximately 178 miles and at normal operating pool (1850 feet mean sea level) the lake covers 368,000 acres and has approximately 1,300 miles of shoreline. It is the largest dam in the system with a storage capacity of approximately 23.8 million acre-feet of water, or approximately 32% of the total storage capacity of 73.4 million acre-feet of water in the Missouri River system. Lake Oahe, which extends into North Dakota from a dam located in South Dakota, has a storage capacity of approximately 23.1 million acre-feet of water, or approximately 31% of the total storage capacity of the Main Stem Dam System.

The Corps of Engineers has developed a water control plan for the operation of the Missouri River Main Stem Dam System that is designed to serve the congressionally authorized project purposes. The guidelines used in the execution of the water control plan are documented in the Missouri River Main Stem Reservoir System Master Reservoir Regulation Manual commonly referred to as the "Master Manual." The Master Manual was first published in 1960 and was last revised in 1979.

In developing annual projections concerning the operation of the main stem system, the Corps of Engineers attempts to work with federal and state agencies, local governments, and citizens to produce a plan each year known as the "Annual Operating Plan" (AOP). The Annual Operating Plan is designed to allow for public input and to inform interested river users about river operations for the upcoming year. Because it is impossible to predict with certainty how much water the Missouri River will receive in any given year, the Annual Operating Plan sets forth various scenarios as to how the Main Stem Dam System will be operated depending upon the timing and quality of

runoff. The current Annual Operating Plan was issued in its final form in January 2003.

B. *THE CLEAN WATER ACT*

The Federal Water and Pollution Control Act, commonly referred to as the Clean Water Act, 33 U.S.C. § 1251 *et. seq.* was designed to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). The Clean Water Act provides for two primary sets of water quality measures: effluent limitations, found in 33 U.S.C. § 1311, and water quality standards, found in 33 U.S.C. § 1313.

The effluent limitations section focuses on the control of individual discharges from "point sources" into the navigable waters. A "point source" is defined as "any discernable, confined, and discrete conveyance" such as a pipe, ditch, or conduit from which "pollutants" may be discharged in navigable waters. *See* 33 U.S.C. § 1362(14). The Clean Water Act provides that the discharge of any "pollutant" by any person shall be unlawful. The term "pollutant" is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *See* 33 U.S.C. § 1362(6). The term "pollution" as opposed to "pollutant" has a broader definition under federal law and means the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of the water." *See* 33 U.S.C. § 1362(19). The courts have determined that the release of water from dams does not equate

with the addition of "pollutants" to navigable waters. *See Missouri ex rel. Ashcroft v. Dept. of the Army*, 672 F.2d 1297, 1303-1304 (8th Cir.1982); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C.Cir.1982).

North Dakota has not alleged that the Corps of Engineers is discharging pollutants into the Missouri River in violation of Sections 301 [33 U.S.C. § 1311] and 402 [33 U.S.C. § 1342] of the Clean Water Act. In fact, North Dakota has specifically stated its cause of action does *not* arise under the Clean Water Act's permitting system, which regulates the discharge of pollutants into navigable waters. *See* 33 U.S.C. §§ 1311, 1342. Although previous decisions regarding the Corps of Engineers activities as it relates to the discharge of pollutants may be somewhat analagous to North Dakota's claims, they are not controlling.

Under Section 303, the Clean Water Act directs each state to establish its own water quality standards, subject to the procedures set forth in federal statutes and regulations. *See* 33 U.S.C. § 1313. State water quality standards must contain three elements, (1) designated uses, (2) numeric or narrative water quality criteria, and (3) antidegradation rules. 40 C.F.R. § 131.6(a), 136.11(a)(1), 131.11(b)(1) and (b)(2), 131.6(d), 131.12. There is no mechanism in the Clean Water Act for the enforcement of water quality standards adopted by the states; rather the enforcement is left to the states.

C. *NORTH DAKOTA WATER POLLUTION LAW AND WATER QUALITY STANDARDS*

On March 27, 2003, North Dakota Governor John Hoeven signed an emergency bill amending North Dakota's

water quality statute which enabled this action to be brought by the State. Section 61-28-06(1) of the North Dakota Century Code states in relevant part as follows:

> 1. It shall be unlawful for any person:
>
> a. To cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any waters of the state; and
>
> b. To discharge any wastes into any waters of the state which reduce the quality of such waters below the water quality standards established therefor by the department.

The statute also provides that:

> 3. Notwithstanding any other provisions of this chapter, and except as in compliance with the provisions of this chapter, and any rules and regulations promulgated hereunder, the discharge of any wastes by any person shall be unlawful. The department may seek injunctive relief for a threatened or continuing violation of a water quality standard, including any violations of the narrative standards, if the department determines that the violation will substantially interfere with or cause or threaten to cause long-term or irreparable harm to waters of this state that the department determines has statewide or regional significance or has a substantial impact to a local community. The authority to seek injunctive relief for a violation of the water quality standards, including violations of the narrative standards, is limited to the department, after obtaining written approval of the governor, and may not be enforced by any other person.

N.D.C.C. § 61-28-06(3). "Person" is defined in the statute to include *"any state or federal agency or entity responsible for managing a state or federal facility."* N.D.C.C. § 61-28-02(5). "Pollution" is defined as "the manmade or man-induced alteration of the physical, chemical, biological, or radiological integrity of any waters of the state." N.D.C.C. § 61-28-02(7). This is virtually the same definition of "pollution" found in the federal Clean Water Act.

D. *HISTORY OF THIS LITIGATION*

On February 20, 2003, the North Dakota Department of Health issued a "Notice of Violation" to the Corps of Engineers alleging apparent continuing violations and actions that threaten to violate North Dakota's water quality standards applicable to Garrison Dam and Lake Sakakawea. The Notice of Violation indicated that the North Dakota Department of Health may file suit against the Corps of Engineers. In essence, the Notice of Violation asserted that the Corps' management of Lake Sakakawea constitutes a form of "pollution" under state law which would threaten the lake's cold water fishery by decreasing the lake's water elevation.[1]

Without prior notice to the Corps of Engineers, the State of North Dakota filed a complaint and a 60-page Motion for Ex Parte Temporary Restraining Order and

[1] As previously noted, the definition of "pollution" under North Dakota law and under the federal Clean Water Act is virtually the same. The North Dakota Department of Health may not adopt rules more stringent than corresponding federal regulations unless it makes written findings after public comment and hearing that the corresponding federal regulations are not adequate to protect the environment of the state. *See* N.D.C.C. § 23-01-04.1(2).

Order to Show Cause for Preliminary Injunction on April 29, 2003. The state district court signed the TRO without a hearing. The complaint seeks a declaratory judgment that the Corps of Engineers' management of Lake Sakakawea and Garrison Dam violates North Dakota's water pollution laws and water quality standards. In essence, the State of North Dakota alleges that the Corps' management of water levels in Lake Sakakawea during the next five (5) months will violate North Dakota water quality standards relating to the maintenance of a cold water fishery in Lake Sakakawea. The Corps of Engineers now seeks to dissolve the Ex Parte Temporary Restraining Order.

There is no dispute that the Missouri River Basin is now in the fourth year of a serious drought. The State of North Dakota is contending that the Corps of Engineers' management of the Main Stem Dam System, and particularly the management of the release of waters from Garrison Dam, constitutes a form of "pollution" because it is a "man-made or man-induced" change that has altered the physical, chemical, and biological integrity of Lake Sakakawea. According to the State, adherence to the Corps of Engineers' April 1, 2003, projected forecast and its current Annual Operating Plan, will result in no cold water fish habitat remaining in Lake Sakakawea by the end of the summer of 2003 if the Corps follows its projected releases. It is undisputed that at the present time, no specific violations of North Dakota law or of any water quality regulations have occurred.

The State of North Dakota is seeking injunctive relief to (1) ensure that the average elevation of Lake Sakakawea remains above the threshold of 800,000 acre-feet of cold water fish habitat during the 2003 summer

months; and (2) to avoid the irreparable harm threshold by reducing forecast releases from Garrison Dam by an average of 2,350 cfs throughout the summer. The evidence presented in the affidavits of Deutschman, Sando, and Power seek to demonstrate that the survival of the cold water fishery in Lake Sakakawea this summer is dependent upon the average elevation of Lake Sakakawea in May before it stratifies; and the amount that inflow into the lake exceeds outflow during the months of June, July, and August.

III. *LEGAL ANALYSIS*

It is well-established that after the removal of an action from state court, the federal court acquires exclusive subject matter jurisdiction over the litigation. *See Ward v. Resolution Trust Corp.*, 972 F.2d 196, 198 (8th Cir.1992). The litigation proceeds as if it had originally been brought in federal court rather than in state court. *Nissho-Iwai Amer. Corp. v. Kline*, 845 F.2d 1300, 1303 (5th Cir.1988). Pursuant to 28 U.S.C. § 1450, "[A]ll injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court." 28 U.S.C. § 1450 is designed to promote judicial economy by making it unnecessary to duplicate in federal court the pleadings previously filed in state court and to ensure that interlocutory orders entered by the state court to protect various rights of the parties will not lapse upon removal to federal court. It is clear that once a case has been removed to federal court, federal law rather than state law governs the course of proceedings.

Rule 65(b) of the Federal Rules of Civil Procedure addresses the subject of temporary restraining orders and provides in relevant part as follows:

> A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney *only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result* to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. (emphasis added)

This Court is cognizant of the federal aversion to granting ex parte temporary restraining orders. In this case, the Ex Parte Temporary Restraining Order was entered on April 29, 2003, without notice and an opportunity for the Corps of Engineers or other interested parties to be heard.

It is well-established under federal law that a temporary restraining order is an emergency remedy which should only be issued in exceptional circumstances. The United States Supreme Court has recognized that a temporary restraining order is an "extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997); *West v. Derby Unified School Dist. No. 260*, 23 F.Supp.2d 1220, 1221 (D.Kan.1998). It is only on rare occasions that an ex parte temporary restraining order is proper and then such orders "should be limited to

preserving the status quo only for so long as is necessary to hold a hearing." *First Technology Safety Systems, Inc. v. Depinet,* 11 F.3d 641, 650 (6th Cir.1993) (citing *Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 of Alameda County,* 415 U.S. 423, 439, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974)). Under Rule 65(b) of the Federal Rules of Civil Procedure, a temporary restraining order may only be granted if it clearly appears from specific facts shown in affidavit(s) or by a verified complaint that "immediate and irreparable injury, loss, or damage will result."

The Court recognizes that ex parte temporary restraining orders are necessary in certain circumstances. However, under federal law such orders should be restricted to serving their underlying purpose of preserving the status quo and preventing "immediate and irreparable injury, loss, or damage" so long as is necessary to hold a hearing. On a motion to dissolve a temporary restraining order, the party that obtained the order (State of North Dakota) bears the burden of justifying the need for continued injunctive relief on a temporary basis and bears the burden of demonstrating "immediate and irreparable injury, loss, or damage." It is clear that if the federal standard for granting a motion for a temporary restraining order is not met, the TRO should not be continued. Nevertheless, the parties are still entitled to a hearing on the application for a preliminary injunction where the burden of establishing *immediate* harm no longer exists – only a showing of *irreparable* harm.

The issue that must be determined in this proceeding as a preliminary matter is whether the State of North Dakota has demonstrated, by a clear showing, that it will suffer "*immediate and irreparable injury, loss, or damage*"

between now and June 4, 2003, when the Court has scheduled a hearing on the Plaintiffs' Motion for Preliminary Injunction. For the reasons set forth below, the Court finds that the plaintiffs have not met that burden of establishing "*immediate*" injury, loss, or damage. As a result, the Ex Parte Temporary Restraining Order should be dissolved at this stage of the litigation.

In the materials presented to the Court, no persuasive showing has been made that the State of North Dakota will suffer "*immediate* and irreparable injury, loss, or damage" if the temporary restraining order is not continued at this stage. Both North Dakota and South Dakota acknowledged at the hearing on May 13, 2003, that the smelt spawn would be complete for 2003 by May 25th. According to the evidence presented to the Court, there is virtually no risk to the smelt eggs at this point in time. The State's initial concerns about maintaining the average elevation of Lake Sakakawea in May before it stratifies and protecting the smelt spawn have been addressed. *See* Order Modifying Ex Parte Temporary Restraining Order dated May 16, 2003.

Simply stated, there is no contention that the Corps of Engineers is currently in violation of North Dakota's anti-pollution laws or the State's water quality regulations. The threat of *immediate* injury, loss, or damage that warranted the issuance of a temporary restraining order on April 29, 2003, has now passed according to the evidence presented to the Court and the admissions of the parties. There is no evidence before the Court of any *immediate* injury, loss, or damage to the State. There certainly may be evidence presented of irreparable harm in the long-term, but nothing of an immediate nature, and certainly no irreparable harm that cannot be addressed at the upcoming

hearing on a preliminary injunction. In summary, the Court has been presented with insufficient evidence at this stage to demonstrate that there is a threat of "*immediate* and irreparable injury, loss, or damage" for the few remaining days of May and early June 2003 until the time of the next hearing scheduled for Wednesday, June 4, 2003.

The second basis for the State's request for temporary injunctive relief concerns the survival of the cold water fishery in Lake Sakakawea as it relates to the amount of inflow into the lake which exceeds outflow during June, July, and August 2003. The State has acknowledged that there are several means to address this concern. The State's proposal, which was incorporated into the TRO, provides for a systematic decrease in the amount of water that is released from Garrison Dam under the Corps' Annual Operating Plan for 2003. The State contends that to avoid irreparable harm to Lake Sakakawea there is a need to decrease the outflows from the lake as much as possible during June, July, and August. That may be an accurate statement but it does not warrant the issuance of a TRO because such concerns and any proposed remedies can be addressed at the preliminary injunction hearing on June 4, 2003.

The State has acknowledged that their proposed remedy, as incorporated in the TRO, is a conservative approach based in part on guesstimates and projected forecasts as to the lake levels throughout the summer months of 2003. The projected inflow and outflow to Lake Sakakawea as forecast by the Corps of Engineers, as well as by the experts retained by the State, are merely forecasts at this stage. The TRO itself acknowledges that the amount of releases can be adjusted throughout the summer after the

Court receives further evidence and argument at the hearing on the preliminary injunction. As such, the immediacy of the harm has not been established. More important, the subject of whether irreparable harm will occur at some later date is one that can be, and will be, addressed at the preliminary injunction hearing on June 4, 2003.

The Court finds that the State of North Dakota has not met its burden of establishing by a clear showing that the Ex Parte Temporary Restraining Order issued on April 29, 2003, needs to be continued at this stage of the litigation. The specific issue before the Court at present is whether there has been a sufficient showing that there is an "immediate and irreparable injury, loss, or damage" that will result to the State if the temporary restraining order is not continued. The Court concludes that the State has not made such a showing.

Assuming the hearing on the Plaintiffs' Motion for Preliminary Injunction goes ahead, the parties need not repeat the extensive evidence that has already been presented in written form or the evidence presented at the hearing conducted on May 12, 2003. The parties are to address the *Dataphase* criteria that this Court must consider in determining whether a preliminary injunction should be issued.

This Court is very cognizant of the importance that Lake Sakakawea has to the State of North Dakota, and particularly the importance to the fishing, recreational, and tourism industry. Garrison Dam, Lake Sakakawea, and the Missouri River are of vital importance to the State of North Dakota. Unfortunately, Mother Nature has not been kind and we are now experiencing the fourth year of a significant drought in the Missouri River Basin. The

sharply divergent interests of the many states that are effected by the Corps of Engineers' plans for operation of the Missouri River Main Stem System have again resulted in a multitude of lawsuits filed in federal courts throughout this region. North Dakota has anti-pollution laws and water quality regulations that are similar to the federal Clean Water Act. North Dakota's regulatory schemes are also similar to the anti-pollution laws and regulations of each of the states that border the Missouri River. When the Corps of Engineers allegedly causes "pollution" in the State of North Dakota as that term is broadly defined under North Dakota law, and water levels are held back to protect the cold water fishery and the biological integrity of Lake Sakakawea, then other downstream states suffer "pollution" as defined by their respective laws and regulations. There simply is no end to the vicious cycle nor any easy solution when drought conditions exist. The result of the drought on the water flows has, once again, pitted the upper basin states against the downstream states.

The State of North Dakota contends that the Corps of Engineers has continually favored a dwindling downstream navigation industry over the growing upstream recreational industry. Specifically, North Dakota officials contend that the economic benefits of downstream navigation have a value of $1 million as compared to a $65 million fishing and tourism industry upstream in North Dakota. Unfortunately, the dispute is not that simplistic, nor is it so easy to balance the equities. It is not a matter of simply weighing the projected value attributable to the barge industry downstream versus the projected value of fishing and tourism upstream.

For example, counsel for the State of Nebraska stated at the oral argument on May 13, 2003, that there are

countless numbers of industries in Nebraska dependent upon the Missouri River which results in a $424 million annual economic benefit to Nebraska. In their pleadings on file in this dispute, Nebraska contends it will be seriously impacted by reduced water flows this summer because (1) Nebraska has power plants that rely on the Missouri River to operate within federal standards and unless water is available at certain minimum levels, four power plants may not be able to operate; (2) there will be significant harm to the water supplies of municipalities, and a resulting increase in treatment costs with reduced flows; (3) Nebraska has a vibrant fishing and recreational industry which will be impacted by reduced flows this summer; (4) there will be reduced economic activity associated with low flow conditions that may result in lost tax revenues in excess of millions of dollars; (5) Nebraska has its own regulatory schemes for water quality and anti-pollution laws and regulations and with diminished water flows, there will be an increase in water temperature which will alter the chemical and biological characteristics of the water with resulting violations of Nebraska's laws and regulatory schemes; (6) the City of Omaha relies on the Missouri River for water and recreation, as do other large cities such as Sioux City, Iowa; Council Bluffs, Iowa; St. Joseph, Missouri; and Kansas City Missouri; and (7) there are 71 recreational areas located between Sioux City, Iowa, and the mouth of the Missouri River that will be significantly impacted by reduced flows this summer. This is the presentation of evidence submitted by the State of Nebraska; only one of the Missouri River Basin states effected by the water flows of the Missouri River. Each of the states will undoubtedly suffer similar impacts in these drought conditions.

Virtually every state along the Missouri River has significant concerns and divergent interests in maintaining adequate water levels and water flows during the summer months of 2003. How are the federal courts to resolve this crisis and what is the role of the federal judiciary in the overall management and operation of the Missouri River? The Eighth Circuit Court of Appeals is presently considering a multitude of legal issues arising out of similar litigation that plagued the federal court system in May 2002. The flurry of lawsuits that inundate the federal courts each spring are becoming a spring ritual. There is no easy solution to this crisis. Every spring involves a race to the courthouse. What has become increasingly clear is that the federal courts are not the appropriate forum to manage the Missouri River dams and reservoir systems.

This Court would again urge the parties to engage Government officials, political representatives at the state and national levels, attorney generals from each of the Missouri River Basin states, and other concerned entities, to become quickly involved in this crisis and seek to attempt to work on an acceptable resolution designed to address the divergent and important needs of all of the states effected. The endless stream of lawsuits will continue until the political forces and the Corps of Engineers attempt to seek a resolution in a forum other than the federal courts.

IV. *CONCLUSION*

The defendant Corps of Engineers' Motion to Dissolve the Ex Parte Temporary Restraining Order is **GRANTED.** The TRO entered on April 29, 2003, and modified on May 16, 2003, is dissolved at this stage of the litigation. A

hearing on the Plaintiffs' Motions for Preliminary Injunction is scheduled for Wednesday, June 4, 2003, beginning at 9:30 a.m. In the interim, the parties are urged the meet and confer about non-judicial remedies to resolve this never-ending crisis. The parties also have the opportunity to immediately appeal this order to the Eighth Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(a)(1).

The Court is cognizant of the need to oversee the releases from Garrison Dam during June-August 2003, and is giving consideration to (1) the scheduling of an early settlement/mediation conference in early June 2003 before a Magistrate Judge to encourage discussion and explore settlement alternatives; and (2) the appointment of a Special Master pursuant to Rule 53 of the Federal Rules of Civil Procedure to monitor the releases and/or to become more intimately involved in the day-to-day operations and management of the Missouri River Main Stem Dam System during the summer of 2003.

SO ORDERED.

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF MCLEAN	SOUTH CENTRAL JUDICIAL DISTRICT
State of North Dakota through the North Dakota Department of Health, an Agency of the State of North Dakota, John Hoeven, Governor, and Wayne Stenehjem, North Dakota Attorney General, ex rel. State of North Dakota, Plaintiffs, v. The United States Army Corps of Engineers, a Federal Agency, and General David A. Fastabend, Commander, NW Division, Portland, Oregon, United States Army Corps of Engineers, and Lt. Colonel Kurt F. Ubbelohde, District Engineer, Omaha District, Defendants.	EX PARTE TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

The Court, having received a Motion for an Ex Parte Temporary Restraining Order and Order to Show Cause, and having reviewed the Motion and its accompanying brief, affidavits, and other documents, and having considered the evidence, law, and equities presented,

HEREBY FINDS:

1. Based on the evidence presented in the affidavits supporting the motion, the survival of the cold-water fishery in Lake Sakakawea this summer appears to

depend on (a) the average elevation of the lake in May before it stratifies, and (b) the amount that inflow into the lake exceeds outflow during June, July, and August. Unless altered, it appears that the Defendant Corps' 2003 Annual Operating Plan (AOP) will entirely deplete the lake's cold-water habitat by late summer, which threatens the survival of most or all the cold-water fishery. Thus, it appears that "immediate corrective steps" (Power Aff. ¶ 11) are necessary to protect Lake Sakakawea's coldwater fishery and habitat. Based on this, the Court finds that there appears to be sufficient factual, legal, and equitable grounds to immediately enjoin the corps pursuant to the authority given by statute to grant equitable and injunctive relief under N.D.C.C. § 32-40-11 and N.D.C.C. § 61-28-06, -07, & -8(5), as recently amended by the North Dakota Legislature in an emergency measure that became effective immediately upon filing with the Secretary of State on March 28, 2003. See Addendum, pages 13-15.

2. Although it is unusual that a federal agency may be sued in state court, the federal Clean Water Act clearly waives federal immunity and requires that "[e]ach" federal agency "having jurisdiction over any property or facility" comply with "all . . . State . . . requirements . . . process and sanctions respecting the control and abatement of water pollution." 33 U.S.C. § 1323(a). This same provision provides that federal agencies may be sued in state court, although it also allows the agency the option to remove the case to federal district court. *Id.* Thus, I find that this Court has jurisdiction to consider and rule on the motion before it.

3. The Corps is a federal agency or entity, and has jurisdiction over Garrison Dam and reservoir, a federal facility and property. As such, it appears that it is subject

to, and must comply with "all . . . State . . . requirements . . . process and sanctions respecting the control and abatement of water pollution." 33 U.S.C. § 1323(a). Thus, I find that the Corps must comply with North Dakota's requirements, process and sanctions respecting the control and abatement of water pollution.

4. Water "pollution" means "the manmade or man-induced alteration" of the physical, chemical, biological, or radiological integrity of any waters of the state. N.D.C.C. § 61-28-02(7); N.D. Admin. Code § 33-16-02.1-04(7). See also 33 U.S.C. § 1362(19). The Corps appears to be causing manmade or man-induced alterations to the biological integrity of Lake Sakakawea (water pollution), and this pollution appears to be impacting all of the lake's associated beneficial uses, including severe impacts that threaten the continuing survival of the coldwater fishery of the lake. That, in turn, will impact many other beneficial uses such as recreation and tourism. The Corps is causing this pollution by increasing discharges from the reservoir to support a single downstream beneficial use – navigation – over all of the upstream beneficial uses that appear to significantly outweigh navigation when all environmental and economic factors are considered. The drought does not appear to be the cause of the threatened state of the lake's coldwater fishery – rather the cause appears to be the Corps' management of the resource. If continued, these excessive discharges threaten to cause violations of North Dakota's water quality standards this summer. Thus, I find that the Corps must manage its discharges from the reservoir to avoid causing pollution that violates the state's water quality standards, including the narrative standards that protect beneficial uses under N.D. Admin. Code § 33-16-02.1.

5. Although the Corps appears to be responsible for managing navigation on the river, it does not appear that it was Congress's intent that the Corps' management authority pre-empt its responsibility to comply with state water pollution requirements. In fact, the Legislative history to the most recent amendment to 33 U.S.C. § 1323 shows it was amended in response to a previous challenge by the Corps to state authority to enforce its water pollution laws. That legislative history states:

> The act has been amended to indicate unequivocally that all Federal facilities and activities are subject to all of the provisions of State and local pollution laws. Though this was the intent of the Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by Federal agencies, has misconstrued the original intent.

Legislative History, P.L. 95-217 (Clean Water Act of 1977) at 67 (December 15, 1977). Thus, I find that the Corps indeed has jurisdiction over navigation on the Missouri River, but that it must exercise that jurisdiction in a manner that complies with state water pollution laws and requirements.

6. Having determined that the Corps is causing water pollution that threatens to violate North Dakota's water quality standards, and that these violations threaten the biological integrity of the lake by threatening the survival of the coldwater fishery, the Court must next balance the equities and consider what equitable relief will provide the greatest immediate benefit to the threatened resource, while minimizing to the greatest extent possible impacts on other reservoirs and downstream beneficial uses. The Corps of Engineers has issued a forecast for the

average daily amount of water it intends to release from Garrison Dam, a federal facility, during the remaining months of 2003. Corps of Engineers, "Most Likely Runoff Simulation Elevations & Storage" (Apr. 1, 2003). (The Forecast covers all the dams on the river.) See State's Addendum at pages 356-58. For Garrison Dam, these forecasts are 19,800 cfs for May, 24,000 cfs for June, 21,500 cfs for July, 21,000 cfs for August, and 16,200 cfs for September. The evidence presented in the affidavits of Deutschman, Sauer, and Power essentially shows that survival of the cold-water fishery in Lake Sakakawea this summer depends on (1) the average elevation of the lake in May before it stratifies, and (2) the amount that inflow into the lake exceeds outflow during June, July, and August. Thus, the equitable relief, to be effective, must address the forecast outflow from the reservoir in a way that effectively (1) increases the average elevation of the lake in May before it stratifies, and (2) decreases the average daily amount of water it intends to release from Garrison Dam under the 2003 AOP.

7. The evidence presented to this court in supporting affidavits to the motion essentially show that there are two biological thresholds that the court needs to consider: a "long-term damage" threshold, and an "irreparable harm" threshold. The provisions of N.D.C.C. § 61-28-06(3), as amended, appear to allow this court to grant injunctive relief when either threshold is exceeded. According to the evidence presented in the affidavits, the long-term damage threshold is crossed when the total volume of cold water habitat in the lake falls below 800,000 acre-feet, and the irreparable harm threshold is crossed when the volume of cold water habitat falls below 200,000 acre feet. Observable negative impacts on the cold water fishery (and

associated impacts on related beneficial uses) apparently occur when the volume of cold water habitat recedes below 800,000 acre-feet and continually worsen as the volume of the habitat declines to zero. Another critical threshold is crossed when the volume of the cold water habitat falls below 200,00 acre-feet, when the survival of the cold water fishery comes into play. As determined in paragraph 1, the affidavit of Todd Sando states that the Defendant Corps' 2003 AOP will entirely deplete the lake's cold-water habitat by late summer, Sando Aff. ¶ 39, which this court has determined poses a threat serious enough to grant immediate relief because it threatens the survival of most or all the cold-water fishery.

8. The essential factual issue the court must address in determining the appropriate equitable relief is to determine when, how, and how much to restrict the monthly forecast flows to protect the cold water fishery and its associated beneficial uses from irreparable harm. As noted, the two options available for avoiding irreparable harm appear to be (1) to increase the average elevation of the lake in May as much as possible before the lake "stratifies," see Sauer Aff. ¶'s 18-26, and (2) to decrease the outflows from the lake as much as possible during June, July, and August. In considering the appropriate relief, the court should bear in mind that the forecasts are only estimates, as are the "long-term damage" and "irreparable harm" thresholds presented in the affidavits. The harm itself, if it occurs, is not an estimate. Thus, the Court will act conservatively to preserve the resource until such time as it receives evidence to show otherwise.

9. Todd Sando's affidavit states that the Court can prevent the cold water habitat from falling below the irreparable harm threshold by ordering discharges from

the dam be cut by 2,500 cfs in the months of June, July, and August. This would do nothing, however, to increase the level of the lake when it stratifies. Todd Sando's affidavit also states that the Court can prevent the cold water habitat from falling below the irreparable harm threshold by ordering discharges from the dam be cut by approximately 8,660 cfs in the months of June, July, and August. The Court will not consider making this larger reduction to protect the resource from crossing the long-term damage threshold until it has heard further evidence presented at a "show cause" hearing for a preliminary injunction.

10. With regard to the ex parte temporary restraining order (TRO), the State in its brief asks that the Court order that the Forecast releases as shown in the April 1, 2003 forecast, be reduced in the amount of 2,350 cfs for the months of May, June, July, and August. These amounts can be adjusted after the court receives further evidence and argument in the order to show cause hearing for the preliminary injunction. By establishing these amounts in the TRO, the state suggests, the Court will allow comment and consideration of a concrete and precise proposal, to which it can make meaningful adjustments after full consideration. The Court agrees that is a factor to be weighed, but it grants the TRO at this time more because of it appears that immediate steps are necessary to protect the coldwater fishery, and delay in implementing immediate relief may result in the harm occurring before appropriate relief may be granted, especially in light of delays that may result from litigating these issues. An order at this time, which will preserve the resource from irreparable harm while the remaining issues are determined,

seems like the most prudent course for the Court to take, after considering the competing equities.

11. It appears from prior litigation, another race-to-the-courthouse may occur to protect Lake Oahe, a portion of which lies in North Dakota. To preserve the status quo until the impact of this order on that resource may be considered further at the order to show cause hearing, I order the Corps to not to let the level of that lake fall until the show cause hearing, at which point the equities can be more fully weighed.

12. Finally, it appears that the Corps is required under Pres. Exec. Order No. 12088, 43 Fed Reg. 47707 (October 13, 1978) to submit a plan to the state that would correct any water pollution violations caused by the Corps, which provides inrelevant part:

> 1-601. Whenever ... the appropriate State ... agency notifies an Executive agency that it is in violation of an applicable pollution control standard (see Section 1-102 of this Order), the Executive agency shall promptly consult with the notifying agency and provide for its approval a plan to achieve and maintain compliance with the applicable pollution control standard. This plan shall include an implementation schedule for coming into compliance as soon as practicable.

The Court finds that the executive order required the Corps to submit such a plan, and further that it would be useful to the Court for the Corps to submit such a plan for the show cause hearing that would address options for the Court to consider that might prevent "long-term" or "irreparable" harm to the cold water fishery of the lake.

Based on these findings, this Court

HEREBY ORDERS:

1. The Corps of Engineers has issued a forecast for the average daily amount of water it intends to release from Garrison Dam, a federal facility, during the remaining months of 2003. Corps of Engineers, "Most Likely Runoff Simulation Elevations & Storage" (Apr. 1, 2003). (The Forecast covers all the dams on the river.) For Garrison Dam, the May forecast is 19,800 cfs. The Defendants and each of them are prohibited from exceeding this amount, less 2,350 cfs, that is, the Defendants and each of them are prohibited from allowing Garrison Dam releases in May that exceed an average daily amount of 17,450 cfs. On April 28, 2003, the Corps of Engineers released 19,400 cfs from Garrison Dam. The Defendants and each of them may not release more than 17,050 cfs on April 30, 2003. This order is made because the Court finds that unless immediately altered, the Corps 2003 Annual Operating Plan (AOP) will likely deplete the Lake Sakakawea's entire cold-water fish habitat by late summer, which will kill most or all of the lake's cold-water fishery. If immediate action is not taken a permanent injunction may be ineffectual because it will come too late to protect the resource. Furthermore, the Defendants and each of them must not allow the May releases from Lake Oahe to exceed the amount forecasted in the April 1, 2003, Forecast referred to above. The Defendants and each of them may not exceed the release rates set forth in this paragraph unless ordered otherwise by this Court or another court with jurisdiction.

2. The Defendants and each of them must prepare and submit a plan to this Court to achieve and maintain

compliance with all North Dakota water pollution laws and water quality standards no later than twenty (20) days from the date of this order, or to show cause why it may not comply with such pollution laws because of matters beyond its control. The Court will not look favorably on a response that raises only jurisdictional issues, and fails to address the allegations of harm that will occur this summer if the 2003 AOP is not modified in a way that reduces impacts on the cold water fishery of Lake Sakakawea to the greatest extent practicable.

3. The Defendants and each of them must prepare and submit to the Court an implementation schedule for coming into compliance with North Dakota water pollution laws and water quality standards as soon as practicable, and if it alleges that it may not because forces beyond its control, then it must present evidence to this Court of a plan that mitigates the effects of its management practices on the cold water fishery to the greatest extent practicable.

4. The Defendants and each of them must show cause why the Court should not issue a preliminary injunction order stating:

> The Corps of Engineers has issued a forecast for the average daily amount of water it intends to release from Garrison Dam, a federal facility, during the remaining months of 2003. Corps of Engineers, "Most Likely Runoff Simulation Elevations & Storage" (Apr. 1, 2003). (The Forecast covers all the damns on the river.) For Garrison Dam, these forecasts are 19,800 cfs for May, 24,000 cfs for June, 21,500 cfs for July, 21,000 cfs for August, and 16,200 cfs for September. The Defendants and each of them are prohibited from

> exceeding these amounts, less 2,350 cfs, that is, the Defendants and each of them are prohibited from allowing Garrison Dam releases that exceed an average daily amount of 17,450 cfs for May, 21,650 cfs for June, 19,150 cfs for July, 18,650 cfs for August, and 13,850 cfs for September. Furthermore, the Defendants and each of them must not allow May, June, July, August, and September releases from Lake Oahe to exceed the amounts forecasted in the April 1, 2003, Forecast referred to above. The Defendants and each of them may not exceed the release rates set forth in this paragraph unless ordered otherwise by this Court or another court with jurisdiction.

Further, the Corps must show cause why more aggressive steps should not be taken under equity to prevent the volume of cold water habitat in Lake Sakakawea form falling this summer below the long-term damage threshold discussed in this Court's findings.

The Court further orders additional hearing on this matter as follows:

The show cause hearing will be held at the MAY 7, 2003 Burleigh County Courthouse in Bismarck, N.D. The hearing will begin at 9:00 a.m. Briefs and affidavits may be submitted to the Court at least five business days before the hearing. After receipt of any additional briefs and affidavits the Court will notify the parties as soon as possible whether it will allow at the show cause hearing the presentation of witnesses or whether the hearing will be limited to oral argument. Any additional affidavits or written arguments submitted by the state must be submitted at least 10 days before the hearing to allow the Corps an opportunity to respond in writing before the Court determines whether oral testimony is necessary.

Dated: April 29, 2003.

/s/ Gail Hagerty
District Court Judge

33 U.S.C.A. § 1313. Water quality standards and implementation plans

(a) Existing water quality standards

(1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is a waiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18, 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the

date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3)(A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, if –

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into

consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new

standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved –

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(d) **Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision**

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title

are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into

account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a

balanced indigenous population of fish, shellfish, and wildlife.

(4) Limitations on revision of certain effluent limitations

(A) Standard not attained

For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) Standard attained

For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

(e) Continuing planning process

(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this chapter.

(2) Each State shall submit not later than 120 days after October 18, 1972, to the Administrator for his approval a proposed continuing planning process which is consistent with this chapter. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this chapter. The Administrator shall not approve any State permit program under subchapter IV of this chapter for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 1311(b)(1), section 1311(b)(2), section 1316, and section 1317 of this title, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 1288 of this title, and applicable basin plans under section 1289 of this title;

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergover mental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 1311 and 1312 of this title.

(f) Earlier compliance

Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 1311(b)(1) and 1311(b)(2) of this title nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

(g) Heat standards

Water quality standards relating to heat shall be consistent with the requirements of section 1326 of this title.

(h) Thermal water quality standards

For the purposes of this chapter the term "water quality standards" includes thermal water quality standards.

(i) Coastal recreation water quality criteria

(1) Adoption by States

(A) Initial criteria and standards

Not later than 42 months after October 10, 2000, each State having coastal recreation waters shall adopt and submit to the Administrator water quality criteria and standards for the coastal recreation waters of the State for those pathogens and pathogen indicators for which the Administrator has published criteria under section 1314(a) of this title.

(B) New or revised criteria and standards

Not later than 36 months after the date of publication by the Administrator of new or revised water quality criteria under section 1314(a)(9) of this title, each State having coastal recreation waters shall adopt and submit to the Administrator new or revised water quality standards for the coastal recreation waters of the State for all pathogens and pathogen indicators to which the new or revised water quality criteria are applicable.

(2) Failure of States to adopt

(A) In general

If a State fails to adopt water quality criteria and standards in accordance with paragraph (1)(A) that are as protective of human health as the criteria for pathogens and pathogen indicators for coastal recreation waters published by the Administrator, the Administrator shall promptly propose regulations for the State setting forth revised or new water quality standards for pathogens and pathogen indicators described in paragraph (1)(A) for coastal recreation waters of the State.

(B) Exception

If the Administrator proposes regulations for a State described in subparagraph (A) under subsection (c)(4)(B) of this section, the Administrator shall publish any revised or new standard under this subsection not later than 42 months after October 10, 2000.

(3) Applicability

Except as expressly provided by this subsection, the requirements and procedures of subsection (c) of this section apply to this subsection, including the requirement in subsection (c)(2)(A) of this section that the criteria protect public health and welfare.

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33 U.S.C. § 1323 (1976 ed.) Federal facilities pollution control

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 1316 or 1317 of this title. No such exemption shall be granted due to lack

of appropriation unless the President shall have specifically requested such appropriation as part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption.

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33 U.S.C.A. § 1323. Federal facilities pollution control

(a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State,

or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer, agent, or employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with section 1441 et seq. of Title 28. No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 1316 or 1317 of this title. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this

section granted during the preceding calendar year, together with his reason for granting such exemption. In addition to any such exemption of a particular effluent source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property, and access to such property, which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature. The President shall reconsider the need for such regulations at three-year intervals.

(b)(1) The Administrator shall coordinate with the head of each department, agency, or instrumentality of the Federal Government having jurisdiction over any property or facility utilizing federally owned wastewater facilities to develop a program of cooperation for utilizing wastewater control systems utilizing those innovative treatment processes and techniques for which guidelines have been promulgated under section 1314(d)(3) of this title. Such program shall include an inventory of property and facilities which could utilize such processes and techniques.

(2) Construction shall not be initiated for facilities for treatment of wastewater at any Federal property or facility after September 30, 1979, if alternative methods for wastewater treatment at such property or facility utilizing innovative treatment processes and techniques, including but not limited to methods utilizing recycle and reuse techniques and land treatment are not utilized, unless the life cycle cost of the alternative treatment works exceeds the life cycle cost of the most cost effective

alternative by more than 15 per centum. The Administrator may waive the application of this paragraph in any case where the Administrator determines it to be in the public interest, or that compliance with this paragraph would interfere with the orderly compliance with conditions of a permit issued pursuant to section 1342 of this title.

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33 U.S.C.A. § 1370. State authority

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

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33 U.S.C.A. § 1371. Authority under other laws and regulations

(a) Impairment of authority or functions of officials and agencies; treaty provisions

This chapter shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter; (2) affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation or (B) under the Act of March 3, 1899 (30 Stat. 1112); except that any permit issued under section 1344 of this title shall be conclusive as to the effect on water quality of any discharge resulting from any activity subject to section 403 of this title, or (3) affecting or impairing the provisions of any treaty of the United States.

(b) Discharges of pollutants into navigable waters

Discharges of pollutants into the navigable waters subject to the Rivers and Harbors Act of 1910 (36 Stat. 593; 33 U.S.C. 421) and the Supervisory Harbors Act of 1888 (25 Stat. 209; 33 U.S.C. 441-451b) shall be regulated pursuant to this chapter, and not subject to such Act of 1910 and the Act of 1888 except as to effect on navigation and anchorage.

(c) Action of the Administrator deemed major Federal action; construction of the National Environmental Policy Act of 1969

(1) Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 1281 of this title, and the issuance of a permit under

section 1342 of this title for the discharge of any pollutant by a new source as defined in section 1316 of this title, no action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 852) [42 U.S.C.A. § 4321 et seq.]; and

(2) Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to –

(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under section 1341 of this title; or

(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.

(d) Consideration of international water pollution control agreements

Notwithstanding this chapter or any other provision of law, the Administrator (1) shall not require any State to consider in the development of the ranking in order of priority of needs for the construction of treatment works (as defined in subchapter II of this chapter), any water pollution control agreement which may have been entered into between the United States and any other nation, and (2) shall not consider any such agreement in the approval of any such priority ranking.

References in Text

The Act of March 3, 1899, referred to in subsec. (a), is Act Mar. 3, 1899, c. 425, 30 Stat. 1121, as amended, which enacted sections 401, 403, 404, 406, 407, 408, 409, 411 to 416, 418, 502, 549, and 687 of this title and amended section 686 of this title. For complete classification of this Act to the Code, see Tables.

The Rivers and Harbors Act of 1910, referred to in subsec. (b), probably means Act June 23, 1910, c. 359, 36 Stat. 593.

The Supervisory Harbors Act of 1888, referred to in subsec. (b), probably means Act June 29, 1888, c. 496, 25 Stat. 209, as amended, which is classified generally to subchapter III (section 441 et seq.) of chapter 9 of this title. For complete classification of this Act to the Code, see Tables.

The National Environmental Policy Act of 1969, referred to in subsec. (c), is Pub.L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (section 4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

N.D. Admin. Code ch. 33-16-02.1-09. Surface water classifications, mixing zones, and numeric standards.

1. **Classifications**. Procedures for the classifications of streams and lakes of the state shall follow this subsection. Classifications of streams and lakes are listed in appendix I and appendix II, respectively.

   a. Class I streams. The quality of the waters in this class shall be suitable for the propagation and/or protection of resident fish species and other aquatic biota and for swimming, boating, and other water recreation. The quality of the waters shall be for irrigation, stock watering, and wildlife without injurious effects. After treatment consisting of coagulation, settling, filtration, and chlorination, or equivalent treatment processes, the water quality shall meet the bacteriological, physical, and chemical requirements of the department for municipal or domestic use.

   b. Class IA streams. The quality of the waters in this class shall be the same as the quality of class I streams, except that treatment for municipal use may also require softening to meet the requirements of the department.

   c. Class II streams. The quality of the waters in this class shall be the same as the quality of class I streams, except that additional treatment may be required to meet the drinking water requirements of the department. Streams in this classification may be intermittent in nature which would make these waters of limited value for beneficial uses such as municipal water, fish life, or irrigation.

d. Class III streams. The quality of the waters in this class shall be suitable for agricultural and industrial uses such as stock watering, irrigation, washing, and cooling. These streams have low average flows and, generally, prolonged periods of no flow. They are of limited seasonal value for immersion recreation, fish life, and aquatic biota. The quality of these waters must be maintained to protect recreation, fish, and aquatic biota.

e. Wetlands. These water bodies are to be considered waters of the state and will be protected under section 33-16-02-08.

f. Lakes. The type of fishery a lake may be capable of supporting is based on the lake's geophysical characteristics. However, the capability of the lake to support a fishery may be affected by seasonal variations or other natural occurrences which may alter the lake characteristics.

Class	Characteristics
1	Cold water fishery. Waters capable of supporting growth of salmonid fishes and associated aquatic biota.
2	Cool water fishery. Waters capable of supporting growth and propagation of nonsalmonid fishes and marginal growth of salmonid fishes and associated aquatic biota.
3	Warm water fishery. Waters capable of supporting growth and propagation of nonsalmonid fishes and associated aquatic biota.

4 Marginal fishery. Waters capable of supporting a fishery on a seasonal basis.

5 Not capable of supporting a fishery due to high salinity.

2. **Mixing zones**. North Dakota mixing zone and dilution policy is contained in appendix III.

3. **Numeric standards.**

a. Class I streams. Unless stated otherwise, maximum limits for class I streams are listed in table 1 and table 2.

b. Class IA streams. The physical and chemical criteria shall be those for class I, with the following exceptions:

Substance or Characteristic	Maximum Limit
Chlorides (Total)	175 mg/l
Sodium	60% of total cations as mEq/l
Sulfate (Total)	450 mg/l

c. Class II streams. The physical and chemical criteria shall be those for class IA, with the following exceptions:

Substance or Characteristic	Maximum Limit
Chlorides (Total)	250 mg/l
pH	6.0-9.0

d. Class III streams. The physical and chemical criteria shall be those for class II, with the following exceptions:

Substance or Characteristic	Maximum Limit
Sulfate (Total)	750 mg/l

e. Lakes.

(1) The beneficial uses and parameter limitations designated for class I streams shall apply to all classified lakes. However, specific background studies and information may require that the department revise a standard for any specific parameter.

2. In addition, these nutrient parameters are guidelines for use as goals in any lake improvement or maintenance program:

Parameter	Limit
NO3 as N	.25 mg/l
PO4 as P	.02 mg/l

3. The temperature standard for Class 1 streams does not apply to Nelson Lake in Oliver County. The temperature of any discharge to Nelson Lake shall not have an adverse effect on fish, aquatic life, and wildlife, or Nelson Lake itself.

History: Effective June 1, 2001.
General Authority: NDCC 61-28-04
Law Implemented: NDCC 23-33, 61-28

APPENDIX II

LAKE CLASSIFICATION

Lakes are classified according to the water characteristics which are to be maintained in the specified lakes. The beneficial water uses and parameter limitations designated for class I streams shall apply to all classified lakes.

COUNTY	LAKE	CLASSIFICATION
Adams	Mirror	3
Adams	N. Lemmon	1
Barnes	Ashtabula	3
Barnes	Heinze	3
Barnes	Moon	2
Barnes	Clausen Spring	1
Benson	Wood Lake	2
Benson	Graves	3
Benson	Reeves	3
Bottineau	Metigoshe	2
Bottineau	Long Lake	2
Bottineau	Pelican	3
Bottineau	Carbury	2
Bottineau	Cassidy	3
Bottineau	Strawberry	2
Bowman	Bowman-Haley	3
Bowman	Gascoyne	3
Bowman	Kalina	3
Bowman	Spring Lake	3

Burke	Powers Lake	3
Burke	Short Creek	2
Burke	Smishek	2
Burke	Truax Mine	1
Burke	Northgate	2
Burke	Bowbells Mine	1
Burleigh	McDowell Dam	3
Burleigh	New Johns Lake	2
Cass	Casselton Reservoir	3
Cass	Hunter Dam	3
Cass	Brewer Lake	2
Cavalier	Mt. Carmel	2
Dickey	Moores Lake	1
Dickey	Pheasant	3
Dickey	Wilson Dam	3
Divide	Skjermo	2
Dunn	Lake Ilo	3
Eddy	Warsing Dam	2
Emmons	Braddock Dam	3
Emmons	Nieuwsma Dam	2
Emmons	Rice Lake	4
Emmons	Welk Dam	3
Foster	Juanita	3
Golden Valley	Camel Hump	1
Golden Valley	Odland Dam	3
Golden Valley	Williams Creek	4

Grand Forks	Fordville	2
Grand Forks	Larimore	2
Grand Forks	Kolding	2
Grant	Tschida	2
Grant	Raleigh Reservoir	4
Grant	Sheep Creek	2
Griggs	Red Willow	3
Griggs	Carlson-Tande	3
Hettinger	Larson Lake	3
Hettinger	Kilzer	3
Hettinger	Castle Rock	1
Hettinger	Indian Creek	3
Hettinger	Mott Dam	2
Hettinger	Blickensderfer	2
Kidder	Cherry Lake	2
Kidder	Crystal Springs	3
Kidder	Frettum Lake	2
Kidder	Round Lake	2
Kidder	Lake Williams	2
Kidder	Lake Isabel	3
Kidder	George Lake	5
LaMoure	Schlect-Weix	3
LaMoure	Hein.-Martin	2
LaMoure	Kulm-Edgeley	2
LaMoure	Cottonwood	4
LaMoure	Kalmbach	4

LaMoure	Schlect-Thom	2
LaMoure	Lake Lamoure	2
Logan	Beaver Lake	3
Logan	Mundt Lake	2
Logan	Rudolph Lake	4
McHenry	Cottonwood	3
McHenry	George Lake	2
McHenry	Round Lake	3
McHenry	Buffalo Lodge	3
McIntosh	Blumhardt	1
McIntosh	Coldwater	2
McIntosh	Green Lake	2
McIntosh	Lake Hoskins	2
McIntosh	Clear Lake	2
McKenzie	Arnegard Dam	4
McKenzie	Sather Dam	2
McLean	Brush Lake	3
McLean	W. Park Lake	2
McLean	E. Park Lake	2
McLean	Brekken	2
McLean	Holmes	2
McLean	Lightning	2
McLean	Crooked Lake	2
McLean	Custer Mine	1
McLean	Audubon	2
McLean	Strawberry	3

McLean	Long Lake	4
McLean	Riv. Spillway	1
Morton	Crown Butte	3
Morton	Fish Creek	1
Morton	Sweetbriar	3
Morton	Nygren	3
Morton	Danzig	3
Mountrail	Clearwater	3
Mountrail	White Earth	2
Mountrail	Stanley Reservoir	3
Nelson	McVille Dam	1
Nelson	Whitman Dam	1
Nelson	Tolna Dam	2
Oliver	Nelson Lake	3
Oliver	Van Oosting	3
Oliver	M. Mosbrucker	2
Oliver	A. Mosbrucker	1
Oliver	E. Arroda Lake	1
Oliver	W. Arroda Lake	1
Pembina	Renwick Dam	2
Pierce	Balta Dam	2
Pierce	Buffalo Lake	2
Ramsey	Devils Lake	3
Ramsey	Cavanaugh	3
Ransom	Dead Colt Creek	3
Renville	Lake Darling	2

Richland	Lake Elsie	2
Richland	Mooreton Pond	2
Rolette	Carpenter	2
Rolette	Dion Lake	2
Rolette	Gravel Lake	1
Rolette	Gordon	2
Rolette	Hooker Lake	1
Rolette	Belcourt	2
Rolette	School Section	2
Rolette	Upsilon	3
Rolette	Shutte Lake	2
Sargent	Alkali Lake	3
Sargent	Silver Lake	2
Sargent	Tewaukon	3
Sargent	Buffalo Lake	4
Sargent	Sprague Lake	3
Sheridan	Hecker	2
Sheridan	S. McClusky	2
Sioux	Froelich	2
Slope	Cedar Lake	3
Slope	Davis Dam	1
Slope	Hamann Dam	1
Slope	Stewart Lake	3
Stark	Patterson	3
Stark	Dickinson Dike	2
Stark	Belfield Pond	3

Steele	N. Tobiason	3
Steele	Golden Lake	3
Steele	N. Golden Lake	3
Stutsman	Jamestown Reservoir	2
Stutsman	Clark Lake	3
Stutsman	Jim Lake	3
Stutsman	Spiritwood	2
Stutsman	Arrowwood	4
Stutsman	Krapp Dam	2
Stutsman	Barnes Lake	3
Stutsman	Pipestem Reservoir	3
Towner	Armourdale	2
Walsh	Matejcek	1
Walsh	Bylin Dam	2
Walsh	Homme Dam	2
Ward	Nelson-Carlson	2
Ward	Rice Lake	2
Ward	Velva Sptsm.	1
Wells	Harvey Dam	3
Wells	Lake Hiawatha	4
Williams	Blacktail	3
Williams	Epp.-Springbrook	2
Williams	Iverson	2
Williams	Kota-Ray	1
Williams	McCloud	3

Williams	McGregor	1
Williams	Tioga Reservoir	2
Williams	Williston Park	4
Williams	Cottonwood	3
	Oahe	1
	Sakakawea	1

Pub. L. No. 95-217, 95th Cong., 1st Sess.

FEDERAL FACILITY COMPLIANCE

SEC. 61. (a) Subsection (a) of section 313 of the Federal Water Pollution Control Act is amended (1) by striking in the first sentence thereof the words "shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges." and inserting in lieu thereof a comma and the words "and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer,

agent, or employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with 28 U.S.C. 1441 et seq. No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court."; and (2) by adding at the end of such subsection the following: "In addition to any such exemption of a particular effluent source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property, and access to such property, which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature. The President shall reconsider the need for such regulations at three-year intervals.".

(b) Section 401(a) of the Federal Water Pollution Control Act is amended by striking paragraph (6) and renumbering and succeeding paragraph accordingly.

COMPLIANCE WITH STATE REQUIREMENTS

SEC. 64. Section 401 of the Federal Water Pollution Control Act is amended by inserting "303," after "302," in the phrase "sections 301, 302, 306, and 307 of this Act", and in the phrase "section 301, 302, 306, or 307 of this Act", each time these phrases appear.

STATE OF NORTH DAKOTA	IN DISTRICT COURT
	SOUTH CENTRAL
COUNTY OF MCLEAN	JUDICIAL DISTRICT
State of North Dakota through the North Dakota Department of Health, an Agency of the State of North Dakota, John Hoeven, Governor, and Wayne Stenehjem, North Dakota Attorney General, ex rel. State of North Dakota, Plaintiffs, v. The United States Army Corps of Engineers, a Federal Agency, and General David A. Fastabend, Commander, NW Division, Portland, Oregon, United States Army Corps of Engineers, and LT. Colonel Kurt F. Ubbelohde, District Engineer, Omaha District, Defendants.	**COMPLAINT** **CIVIL NO.**

PRELIMINARY STATEMENT

1. This is a civil action for declaratory judgment and injunctive relief to prevent the United States Army Corps of Engineers (Corps) from violating North Dakota's water quality standards in the Lake Sakakawea reservoir as a result of its operation of the Garrison dam. The Corps will cause long-term damage and irreparable harm to the Lake Sakakawea cold water habitat and fishery as result of violations of North Dakota's water quality standards.

2. Plaintiffs seek a declaration that the Corps' action in operating the Garrison Dam violates North Dakota water quality standards. N.D.C.C. § 61-28-06(1)(b), and N.D. Admin. Code, Ch. 33-16-02.1.

3. This action also seeks injunctive relief directing the Corps to comply with North Dakota's water quality standards. N.D.C.C. § 61-28-06(3); N.D.C.C. § 61-28-07. 33 U.S.C. § 1323 [§ 313 of the Clean Water Act] subjects federal facilities to state authority, process, and sanctions, and allows the state to enforce water quality standards against federal facilities in state or federal court.

4. These water quality standard violations constitute serious, long-standing, and ongoing violations of state law that have degraded water quality, impaired beneficial uses, and cause long-term or irreparable harm to the cold water fishery in Lake Sakakawea. Despite requests from the State, including Notice of Violation issued on February 20, 2003, to correct its violations and implement a strategy for complying with water quality standards, the Corps has failed to correct its violations.

JURISDICTION AND VENUE

5. Section 313 of the Clean Water Act, 33 U.S.C. § 1323, obligates federal facilities to comply with state water quality standards: "each" federal agency "having jurisdiction over any property or facility . . . shall be subject to, and comply with, all . . . State . . . requirements . . . process and sanctions respecting the control and abatement of water pollution." 33 U.S.C. § 1313 directs each state to establish its own water quality standards, and federal facilities are subject to these standards.

6. Venue is properly vested in this Court pursuant to N.D.C.C. § 61-28-07 because Garrison Dam is located in this county.

DESCRIPTION OF THE PARTIES AND THEIR INTERESTS

7. Plaintiff Department of Health is the state agency responsible for promulgating and enforcing North Dakota water pollution law under N.D.C.C. Ch. 61-28; N.D. Admin. Code Ch. 33-16-02.1.

8. Plaintiff Governor John Hoeven is responsible for the execution and enforcement of the laws of North Dakota, including those laws that promote the fish and wildlife interests of the state and the economy of the state. N.D. Const. art. V, § 7. Plaintiff State of North Dakota, a body politic and sovereign entity (both hereafter referred to as "North Dakota"), bring this action on behalf of itself and on behalf of all its citizens and visitors. North Dakota owns, manages, and regulates fishery resources in Lake Sakakawea for the benefit of itself, its residents and citizens, and visitors from other states and countries, N.D.C.C. § 20.1-01-03, and for the significant enhancement of the economy of its state.

9. The Defendant, United States Army Corps of Engineers, is a federal agency or entity. It owns and operates six dams and reservoirs on the main stem of the Missouri River, including Garrison Dam and Lake Sakakawea in North Dakota. As the operator of these dams, the Corps has the responsibility to ensure that its actions do not cause violations of water quality standards.

10. Defendant Lieutenant Colonel Kurt F. Ubbelohde is the District Engineer of the Corps in charge of the operating Garrison Dam on the Missouri River pursuant to federal law.

11. Defendant Brigadier General David F. Fastabend is Commander, Northwest Division, Portland, Oregon, who stands in superior authority to Lieutenant Colonel Ubbelohde and who is also responsible for the operation of Garrison Dam and therefore Lake Sakakawea.

12. The plaintiffs and its citizens use and enjoy Lake Sakakawea for recreational, scientific, aesthetic, and commercial purposes. Plaintiffs and its citizens derive, or, but for the threatened status of the cold water fishery at Lake Sakakawea, would derive, environmental, health, recreational, aesthetic, and commercial benefits from the existence of the fishery and the beneficial uses of the reservoir. North Dakota's water quality classifications and standards are established "for the protection of public health and environmental resources and for the enjoyment of these waters, to ensure the propagation and well-being of resident fish, wildlife, and all biota associated or dependent upon these waters, and to safeguard social, economical, and industrial development." N.D. Admin. Code, § 33-16-02.1-02(2). The past, present, and future enjoyment of these beneficial uses by plaintiffs and its citizens has been, is being, and will continue to be irreparably harmed by the defendants' disregard of its statutory duties, as described below, and by the unlawful violations caused in the Lake Sakakawea cold water habitat and fishery by the defendant's operation of Garrison Dam and Lake Sakakawea.

13. The above described environmental, health, aesthetic, conservation, recreational, and scientific interests of the state and its citizens have been, are being, and, unless the relief requested is granted, will continue to be adversely affected and irreparably injured by the failure of the defendant to comply with North Dakota's water pollution law and water quality standards. Plaintiffs have no adequate remedy at law.

BACKGROUND

14. N.D.C.C. § 61-28-01 provides: "It is hereby declared to be the policy of the state of North Dakota to act in the public interest to protect, maintain, and improve the quality of the waters in the state for continued use as public and private water supplies, propagation of wildlife, fish and aquatic life, and for domestic, agricultural, industrial, recreational, and other legitimate beneficial uses, to require necessary and reasonable treatment of sewage, industrial, or other wastes and to cooperate with other agencies in the state, agencies of other states, and the federal government in carrying out these objectives."

15. One of the primary means of implementing this goal is the establishment and implementation of water quality standards. The Clean Water Act directs each state to establish its own water quality standards. 33 U.S.C. § 1313(a) and (c)(2)(A). Water "pollution" means "the man-made or man-induced alteration of the physical, chemical, biological, or radiological integrity of any waters of the state." N.D.C.C. § 61-28-02(7); 33-16-02.1-07. Water "pollution" includes any "alteration of the physical, chemical, or biological properties, of any waters of the state, including change in temperature", N.D. Admin. Code, § 33-16-02.1-04(7), which

is detrimental to "the propagation of resident fish, wildlife, and all biota associated or dependent upon these waters. . . ." N.D. Admin. Code, § 33-16-02.1-02(2). Water quality standards "are established to maintain and protect existing uses." Id; See N.D. Admin. Code, § 33-16-02.1-07 ("waters of the state shall be used to maintain and protect the present and beneficial uses of these waters.").

16. State water quality standards must contain at least three elements. First, the State must establish "designated uses" (such as fishing, swimming, or protection of aquatic life) for all of the State's waters. 40 C.F.R. § 131.6(a). Second, the State must develop specific water quality criteria, "based on sound scientific rationale" designed to ensure the preservation of the designated uses. 40 C.F.R. §§ 131.6(a) and 131.11(a)(1). The criteria may be expressed in either numerical (such as "no more than 18 micrograms of arsenic per liter") or narrative values (such as "waters shall be free of floating debris"). 40 C.F.R. § 131.11(b)(1), (b)(2). Third, the State must develop antidegradation rules designed to prevent further deterioration in the quality of its waters. 40 C.F.R. §§ 131.6(d), 131.12. The states must evaluate and update these water quality standards at least every three years to ensure protection of the designated uses. 33 U.S.C. 1313(c)(1).

17. Section 313, 33 U.S.C. § 1323, of the Clean Water Act obligates federal agencies to comply with state water quality standards, as established by the states.

NORTH DAKOTA'S WATER QUALITY STANDARDS

18. North Dakota's water quality standards are promulgated at N.D. Admin. Code Ch. 33-16-02.1, and their last revision under the continuing planning process

required by the Clean Water Act became effective June 1, 2001. These standards establish a system for classifying waters of the State, "provide standards" or water quality for waters of the State. N.D. Admin. Code § 33-16-02.1-02(1). North Dakota has designated Lake Sakakawea as a class 1 lake. Appendix II, N.D. Admin. Code Ch. 33-16-02.1. Lakes are classified according to their "water characteristics" which "are to be maintained in the specified lakes." Id.

19. North Dakota's water quality standards specify that "waters of the state shall be used to maintain and protect the present and beneficial uses of these waters." N.D. Admin. Code, § 33-16-02.1-07. A violation of North Dakota water quality standards occurs when a person "discharges any wastes into any waters of the state", *or* "cause[s] pollution, which reduces the quality of such waters below the water quality standards established therefor by the department." N.D.C.C. § 61-28-06(1)(b). The designated beneficial use of a class 1 lake are a "[c]old water fishery. Waters capable of supporting growth of salmonid and associated aquatic biota." N.D. Admin. Code § 33-16-02.1-09(1)(f). "The beneficial water uses and parameter limitations designated for class 1 streams shall apply to all classified lakes." Appendix II, N.D. Admin. Code Ch. 33-16-02.1; N.D. Admin. Code § 33-16-02.1-09(3)(e). This includes a requirement that they be managed so that "[t]he quality of the waters in this class shall be suitable for the propagation or protection, or both, of resident fish species and other aquatic biota and for swimming, boating, and other water recreation." N.D. Admin. Code § 33-16-02.1-09(1)(a).

20. North Dakota has established a specific (numeric) dissolved oxygen standard. Lake Sakakawea must

be managed to prevent a "dissolved oxygen" level of "not less than 5 mg/l." Table 1, N.D. Admin. Code Ch. 33-16-02.1.

21. North Dakota has established a numeric temperature standard of eighty-five degrees, N.D. Admin. Code, § 33-16-02.1-09, form 1, and a narrative standard. Water "pollution" includes any "alteration of the physical, chemical, or biological properties, of any waters of the state, including change in temperature" N.D. Admin. Code, § 33-16-02.1-04(7), which is detrimental to "the propagation of resident fish, wildlife, and all biota associated or dependent upon these waters. . . ." N.D. Admin. Code, § 33-16-02.1-02(2). The narrative standard for temperature requires that "[t]he quality of the waters in this class shall be suitable for the propagation or protection, or both, of resident fish species and other aquatic biota and for swimming, boating, and other water recreation." N.D. Admin. Code § 33-16-02.1-09(1)(a).

22. North Dakota has, in accordance with the Clean Water Act, developed an anti-degradation policy, which provides that "[w]aters with existing quality that is higher than established standards will be maintained at the higher quality unless affirmatively demonstrated, after full satisfaction of the intergovernmental coordination and public participation provisions of the continuing planning process, that a change in quality is necessary to accommodate important social or economic development in the area in which the waters are located. In allowing the lowering of existing quality, the department shall assure that existing uses are fully protected and that the highest statutory and regulatory requirements for all point sources and cost-effective and reasonable best management practices for

nonpoint sources are achieved." N.D. Admin. Code § 33-16-02.1-02(2)(a).

23. N.D.C.C. § 61-28-06(3) provides that "[t]he department may seek injunctive relief for a threatened or continuing violation of a water quality standard, including any violations of the narrative standards, if the department determines that the violation will substantially interfere with or cause or threaten to cause long-term or irreparable harm to waters of this state that the department determines has statewide or regional significance or has a substantial impact on a local community."

STATEMENT OF FACTS

24. Lake Sakakawea is a cold water fishery. Survival of chinook salmon and rainbow smelt (smelt) depends on sufficient cold waters. Based on the Houston Engineering model, and affidavits of Marl Deutschman, Todd Sando, and Mike Sauer, it is likely that violations of the narrative temperature standard and the numeric dissolved oxygen level will occur this summer as well as violations of the narrative standards protecting aquatic biota and related beneficial uses, if the Corps implements its current annual operating plan. Water quality standards are violated when the volume of cold water habitat falls below 800,000 acre feet. Long-term damage to the cold water fishery occurs when the cold water habitat falls below 800,000 acre feet. Irreparable harm occurs to the cold water fishery when the cold water habitat falls below 200,000 acre feet.

25. The empirical model, the Corps' April 1 forecast, and the Corps' 2003 annual operating plan show that not only will North Dakota's water quality standards be violated, there will be no cold water fishery habitat in

Lake Sakakawea at the end of the summer. Two variables determine the volume of cold habitat: the average elevation of Lake Sakakawea in May, and the difference between the volume of runoff to, and discharged from, the lake during the months of June, July, August and September.

26. To stay above the long-term damage threshold of 800,000 acre-feet of Cold Water Habitat during the 2003 summer months, if the beginning elevation of Lake Sakakawea is 1821.95 [msl] as predicted by the U.S. Army Corps of Engineers, [Deutschman's] modeling study and report show that the inflow volume into Lake Sakakawea must exceed the outflow volume by an estimated 2.13 million acre feet during the months of June, July, August and September. This could be accomplished by reducing the forecast releases from the System and therefore from Garrison Dam by 8,660 cfs. The "irreparable harm" threshold – 200,000 acre feet – may be avoided merely by reducing the forecast releases from the System and therefore from Garrison Dam by 2,500 cfs throughout the summer.

27. As the volume of cold water habitat shrinks to zero, chances of die-off of the coldwater fishery – whether by single dramatic event, or by gradual, incremental decline – become a "near certainty" if sustained. When the volume of the cold water fish habitat fall below these levels and is sustained, long-term damage, and irreparable harm occurs to the cold water fishery, decimating the populations of the Chinook salmon and smelt.

28. The Plaintiffs Department of Health and the Governor have sent letters warning the Corps that any drop in elevation of Lake Sakakawea below 1825' msl in

elevation will likely cause water quality violations under N.D. Admin. Code ch. 33-16-02.1. The Department issued a Notice of Violation on February 20, 2003. Exhibit 4, and more than 30 days have expired since its service. N.D.C.C. § 32-40-07. The department determined that the water quality violations have "statewide or regional significance." Addendum at 12. By letter dated April 8, 2003, Governor Hoeven authorized the State to seek injunctive relief for violation of North Dakota's water quality standards. Addendum at 11.

29. The health of Lake Sakakawea's smelt forage base supports the sport fish harvest. The decline of the cold water habitat in Lake Sakakawea below 800,000 acre-feet will cause long-term harm to the smelt forage base and cold water fishery in the lake. Loss of the smelt forage base has a dramatically adverse impact to the sport fish harvest. The effects of a reduced smelt population result in a significant reduction in the populations of the sport fish populations, including Chinook salmon and walleye.

30. Lake Sakakawea is nationally recognized as a trophy walleye fishery and it is North Dakota's number one fishery, accounting for two million angler hours of fishing and tens of millions of angler expenditures annually. Thirty percent of all North Dakota anglers fish Lake Sakakawea at some time during the course of the year. Walleye are by far the most sought after and harvested species in the lake. Nearly 750,000 walleye were caught and 500,000 were harvested from Lake Sakakawea in 2000. Part of the angler allure for fishing walleye at Lake Sakakawea is the relatively large size of the walleye, and growth and condition of walleye are dependent upon the abundance of the rainbow smelt forage base.

31. The cold water fishery on Lake Sakakawea is one of only three disease free fresh water Chinook salmon fisheries, and the principal source from which disease free stock are drawn. The hatchery at Lake Sakakawea gets all salmonid stock from that fishery, and cannot accept diseased stock. If Lake Sakakawea's cold water fishery is lost or destroyed, the hatchery will not be able to accept any diseased salmonid stock to restock the lake, and not only the lake, but the world, will lose the primary remaining source for disease free fresh water Chinook salmon for stocking Lake Sakakawea and other lakes.

32. Although some of the elevation drop at Lake Sakakawea is attributable to drought conditions in the Missouri River Basin, the Corps' management and excessive releases from the reservoir threaten to cause and are causing violations of the numeric standard for dissolved oxygen, the temperature standards necessary to support a cold water fishery, and the biological integrity and beneficial uses protected by the narrative water quality standards. The actions of the Corps are causing water pollution, and violates or threatens to violate Lake Sakakawea's water quality classification and standards and is therefore subject to state enforcement under 33 U.S.C. § 1323 and North Dakota's water pollution law. N.D.C.C. ch. 61-28. Further, "[all] known and reasonable methods to control and prevent pollution of the waters of this state are required, including improvement in quality of these waters, when feasible." N.D. Admin. Code § 33-16-02.1-02(2).

WATER POLLUTION AND WATER QUALITY VIOLATIONS

33. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

34. The overriding goal of North Dakota water pollution law is to "protect, maintain, and improve the quality of the waters in the state for continued use as public and private water supplies, propagation of wildlife, fish and aquatic life, and for domestic, agricultural, industrial, recreational, and other legitimate beneficial uses. . . ." N.D.C.C. § 61-28-01.

35. The Corps of Engineers operates a federal facility, the Garrison Dam, and must comply with North Dakota's water quality standards pursuant to CWA § 313, 33 U.S.C. § 1323. The federal act provides that "[e]ach department, agency, or instrumentality of the executive. . . . branch[ ] of the Federal Government . . . having jurisdiction over any property of facility" must comply with all "Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution. . . ." 33 U.S.C. § 1323. North Dakota law provides that water quality standards are enforced against any person, "including any state or federal entity responsible for managing a state or federal facility." N.D.C.C. § 61-28-02(5).

36. North Dakota's water quality standards for Lake Sakakawea specify that its temperature must support its cold water fishery, "for the protection of public health and environmental resources and for the enjoyment of these waters, to ensure the propagation and well-being of resident fish, wildlife, and all biota associated or dependent

upon these waters, and to safeguard social, economical, and industrial development." N.D. Admin. Code, § 33-16-02.1-02(2).

37. North Dakota's water quality standards for Lake Sakakawea require that the dissolved oxygen level be "not less than 5 mg/l." Table 1, N.D. Admin. Code, § 33-16-02.1.

38. Water pollution means "the manmade or man-induced alteration of the physical, chemical, biological, or radiological integrity of any waters of the state", N.D.C.C. § 61-28-02(7); 33 U.S.C. § 1362(19), "including change in temperature." N.D. Admin. Code, § 33-16-02.1-04(7). The alteration of dissolved oxygen in the waters attributable to the Corps' operation of the Dam is a man-induced alteration of the chemical properties of the waters. The Corps' operation and management of discharges and releases from the Dam is a man-induced alteration in the physical integrity of the waters, and affects and impacts the chemical and biological integrity of the waters by its effects on the quality and quantity of the cold water fish habitat in the lake. The Corps may not violate North Dakota's water quality standards at Lake Sakakawea as a result of its operation of the Garrison Dam. North Dakota's water quality standards are violated when, because of excessive discharges under Corps management, the Lake's cold water habitat falls below 800,000 acre feet when long-term damage occurs. Irreparable harm occurs when the cold water habitat of the Lake falls below 200,000 acre feet. Unless the Corps is enjoined, the Corps' operation of Garrison Dam will cause violation of water quality standards, the narrative and numeric water quality standards.

39. North Dakota's water quality standards specify that "waters of the state shall be used to maintain and

protect the present and beneficial uses of these waters." N.D. Admin. Code, § 33-16-02.1-07. A violation of North Dakota water quality standards occurs when a person "discharges any wastes into any waters of the state", *or* "cause[s] pollution, which reduces the quality of such waters below the water quality standards established therefor by the department." N.D.C.C. 61-28-06(1)(b). Further, "[w]aters with existing quality that is higher than established standards will be maintained at the higher quality unless affirmatively demonstrated, after full satisfaction of the intergovernmental coordination and public participation provisions of the continuing planning process, that a change in quality is necessary to accommodate important social or economic development in the area in which the waters are located. In allowing the lowering of existing quality, the department shall assure that existing uses are fully protected and that the highest statutory and regulatory requirements for all point sources and cost-effective and reasonable best management practices for nonpoint sources are achieved." N.D. Admin. Code § 33-16-02.1-02(2)(a). The Corps has a duty under North Dakota's clean water standards not to induce degradation of water quality at Lake Sakakawea as a result of its operation of the Garrison Dam.

40. The Corps' operational and other management decisions for Garrison Dam violate N.D.C.C. ch. 61-28 and N.D. Admin. Code ch. 33-16-02.1 because these actions are being carried out in ways that cause or contribute to violations of water quality standards.

41. The Corps' operation of Garrison Dam is unlawful and is subject to enforcement by injunction under N.D.C.C. §§ 61-28-06, 61-28-07, and 33 U.S.C. § 1323.

42. North Dakota does not have an adequate remedy at law, and damages are an insufficient remedy because violations of North Dakota's water quality standards "causes or threatens to cause" "long-term or irreparable harm" to the habitat and cold water fishery of Lake Sakakawea. N.D.C.C. § 61-02-06(3). Injunctive relief is necessary because the management of the Garrison Dam by the Corps "causes or threatens to cause a continuing violation of water quality standards in a manner that substantially interferes with or threatens to cause long-term or irreparable harm to the waters of this state". N.D.C.C. § 61-02-06(3); N.D.C.C. § 61-28-07. The Court may order appropriate relief under North Dakota's water pollution law, N.D.C.C. ch. 61-28, and environmental enforcement statute, N.D.C.C. § 32-40-11. The Corps is subject to injunctive relief issued under state law, pursuant to 33 U.S.C. § 1323.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:

A. Determine and declare that the United States Army Corps of Engineers is in violation of N.D.C.C. ch. 61-28 and implementing rules, by causing water pollution that violates North Dakota's water quality standards.

B. Determine and declare that the Corps' management of releases of water from Lake Sakakawea is in violation of the North Dakota water quality classification and standards for Lake Sakakawea, including the beneficial uses, biologic integrity, numeric dissolved oxygen standard, and the narrative standards and classification that protect the cold water fishery.

C. Issue an order that the Corps of Engineers must manage Lake Sakakawea to prevent any "manmade or man-induced alteration of the physical, chemical, biological, or radiological integrity of any waters of the state" in accordance with North Dakota's water pollution law and water quality standards, and to adjust releases from storage in the Garrison reservoir accordingly.

D. Issue orders that plaintiffs are entitled to a temporary restraining order, a preliminary injunction, and a permanent injunction to prevent long-term or irreparable harm to the Lake Sakakawea habitat and fishery due to violations of North Dakota's clean water standards.

E. Award plaintiffs their reasonable attorneys fees, costs, expenses, and disbursements under applicable statute or under general principles of law and equity.

F. Grant such further and additional relief as the Court may deem just.

Dated this 29 day of April, 2003.

State of North Dakota
Wayne Stenehjem
Attorney General

BY: /s/ Lyle G. Witham
Lyle G. Witham
Assistant Attorney General
State Bar ID No. 04118
Office of Attorney General
500 North Ninth St.
Bismarck, ND 58501-4509
(701) 328-3640

/s/ Dean J. Haas
Dean J. Haas
Assistant Attorney General
State Bar ID No. 04032
Office of Attorney General
500 North Ninth St.
Bismarck, ND 58501-4509
(701) 328-3640

Attorneys for the Plaintiff

STATE OF NORTH DAKOTA

COUNTY OF MCLEAN

IN DISTRICT COURT

SOUTH CENTRAL
JUDICIAL DISTRICT

State of North Dakota through the North Dakota Department of Health, an Agency of the State of North Dakota, John Hoeven, Governor, and Wayne Stenehjem, North Dakota Attorney General, ex rel. State of North Dakota,

Plaintiffs,

v.

The United States Army Corps of General David A. Fastabend, Commander, NW Division, Portland, Oregon, United States Army Corps of Engineers, and LT. Colonel Kurt F. Ubbelohde, District Engineer, Omaha District,

Defendants.

AFFIDAVIT OF MICHAEL T. SAUER
CIVIL NO.

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Michael T. Sauer states under oath as follows:

1. I am currently a senior environmental scientist with the Water Quality Division of the Environmental Health Section of the North Dakota Department of Health (Department), where I have been employed since 1979. I

develop Water Quality Standards for all waters of the state, including surface waters such as Lake Sakakawea. I also review environmental impact statements and provide water quality certifications under Section 401 of the Clean Water Act. I have also served as the Department Limnologist and Water Quality Program Manager. I received a Bachelors degree, and a Masters degree in biology with emphasis in aquatic biology, from St. Cloud State University in Minnesota. I have served as the Regional Director of the North American Lake Management Society, and am a past President of the North Dakota Water Pollution Control Federation. I serve on numerous committees, commissions, and boards relating to water quality protection as part of my responsibilities with the Department.

Regulatory Background

2. Water quality standards have three basic elements:

(a) designated uses;.

(b) water quality criteria necessary to support those uses; and

(c) antidegradation policies and procedures.

The designated uses describe the existing or potential use of a water body. The numeric and narrative criteria protect designated uses, including general requirements that protect those uses. Antidegradation policies and procedures are established to protect, maintain and improve the water quality necessary for all existing and designated uses by preventing further deterioration of water quality when it is better than existing standards.

3. The Department is the state agency responsible for promulgating and enforcing the water quality standards of the Clean Water Act within North Dakota. The Department periodically reviews and revises its water quality standards as required by the Clean Water Act. 33 U.S.C. § 1313(c)(2)(A).

4. The Department's water quality standards, N.D. Admin. Code ch. 33-16-02.1, are attached as Exhibit A. They were last revised under the continuing planning process required by the Clean Water Act on June 1, 2001. As noted, these standards establish a system for "classifying" waters of the state, "provide standards" of water quality for waters of the state, and "protect existing and potential beneficial uses" of waters of the state. N.D. Admin. Code § 33-16-02.1(1).

5. Garrison Dam is a federal facility managed by the United States Army Corps of Engineers (Corps). The dam and reservoir (Lake Sakakawea) are located entirely in North Dakota.

6. Lake Sakakawea is a water of the state of North Dakota. N.D.C.C. § 61-28-02(11).

7. North Dakota's water quality classifications and standards are established "for the protection of public health and environmental resources and for the enjoyment of these waters, to ensure the propagation and well-being of resident fish, wildlife, and all biota associated or dependent upon these waters, and to safeguard social, economical, and industrial development." N.D. Admin. Code § 33-16-02.1-02(2). "All known and reasonable methods to control and prevent pollution of the waters of this state are required, including improvement in quality of these waters, when feasible." *Id.*

8. "Waters with existing quality that is higher than established standards will be maintained at the higher quality unless affirmatively demonstrated, after full satisfaction of the intergovernmental coordination and public participation provisions of the continuing planning process, that a change in quality is necessary to accommodate important social or economic development in the area in which the waters are located. In allowing the lowering of existing quality, the department shall assure that existing uses are fully protected and that the highest statutory and regulatory requirements for all point sources and cost-effective and reasonable best management practices for nonpoint sources are achieved." N.D. Admin. Code § 33-16-02.1-02(2)(a).

9. "Classification of waters of the state shall be used to maintain and protect the present and future beneficial uses of these waters." N.D. Admin. Code § 33-16-02.107.

10. Lake Sakakawea is classified as a Class 1 lake under North Dakota's water quality standards. See Exhibit A, Appendix II, N.D. Admin. Code § 33-16-02.1. Lakes are classified according to their "water characteristics" which "are to be maintained in the specified lakes." *Id.*

11. The designated beneficial uses of a "[c]old water fishery" in a class 1 lake include: "a. Waters capable of supporting growth of salmonid fishes and associated aquatic biota." N.D. Admin. Code § 33-16-02.1-09(1)(f).

12. The cold water fishery in Lake Sakakawea is a disease-free Chinook salmon fishery.[1] The hatchery at the base of Garrison Dam gets its salmonid stock from Lake Sakakawea.

13. The use and value of Lake Sakakawea as a cold water fishery for the propagation of fish and wildlife and for recreational and related purposes are existing and potential beneficial uses that must be maintained "for the protection of public health and environmental resources and for the enjoyment of these waters, to ensure the propagation and well-being of resident fish, wildlife, and all biota associated or dependent upon these waters, and to safeguard social, economical, and industrial development." N.D. Admin. Code § 33-16-02.1-02(2).

14. The Department and the Governor have sent letters warning the Corps that any drop in elevation of Lake Sakakawea below 1825' msl in elevation will likely cause water quality violations under N.D. Admin. Code. Ch. 33-16-02.1. See letters attached Exhibits B through D.

15. Starting in 1992, the Department initiated extensive water quality monitoring of Lake Sakakawea. The Corps, in its draft revised master manual for the Missouri River, acknowledges that a correlation exists between water quality and reservoir elevations. The collected data demonstrate that water quality deteriorates at lower reservoir elevations.

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[1] "Disease free" refers to bacteria that affect the health of the salmonid fishery, and does not refer to suitability for human consumption.

16. The beneficial water uses and parameter limitations designated for class 1 streams apply to all classified lakes. Appendix II, N.D. Admin. Code ch. 33-16-02.1; N.D. Admin. Code § 33-16-02.1-09(3)(e). They must be managed so that "[t]he quality of the waters in this class shall be suitable for the propagation or protection, or both, of resident fish species and other aquatic biota and for swimming, boating, and other water recreation." N.D. Admin. Code § 33-16-02.1-09(1)(a).

17. The substantial data collected since 1992 demonstrate that water pollution caused by the manmade alteration of the level of Lake Sakakawea likely will cause dissolved oxygen to fall below 5 mg/l in the hypolimnion (the deeper parts of the lake that support the cold water fishery) at 1825' msl during the summer months, and will grow increasingly worse at elevation levels lower than that, depending on weather conditions and the length of time levels below 1825' msl are sustained. Eventually the cold water habitat will become so small that the cold water fishery, and the food web necessary to support it, can no longer exist. The department has notified the Corps on numerous occasions that failure to maintain an 1825' msl elevation will likely cause water quality violations if continued into the summer months. Currently the level of Lake Sakakawea is well below that level, and, unless either management of the lake is changed or a large amount of precipitation falls in the upper basin of the Missouri River, the level of the lake is likely to stay at a level below 1825' msl into the summer months when the water quality violations will likely occur.

Lake Dynamics

18. Before interpreting cause and effect relationships within lakes, it is helpful to understand the physical, chemical and biological processes of lakes. Each lake is a complex and dynamic system that is influenced by its unique set of hydrologic conditions, its watershed, the shape of the lake basin, the chemical content of lake water and the bottom sediments. These physical and chemical components in turn support a biological community that is unique to each lake's environment. Biological factors increase the complexity of lake ecosystems. All types of aquatic life in a lake not only have myriads of links to one another, but also affect the lake's physical and chemical features. All of these components – the physical, the chemical, and the biological – are in constant flux. The chemical and biological components are particularly dynamic because lakes are highly interactive systems. Usually, when you alter one characteristic, some other aspect of the system is also affected.

19. To understand lake dynamics, it is useful to understand a few basic principles about water density and dissolved oxygen:

a. The density of water is temperature-dependent. Generally the colder water is, the denser it becomes. Thus, sun-warmed water generally will remain at the surface of a water body, while more-dense, cooler water stays at the bottom. This causes lakes to "stratify" in the spring as the water near the surface warms up, while the colder water remains at the bottom.

b. How much dissolved oxygen water can hold is temperature-dependent. Generally the colder the water is, the more dissolved oxygen it holds.

c. Dissolved oxygen is the volume of oxygen that is contained in water. Oxygen enters the water by photosynthesis from aquatic plants and by the transfer of oxygen across the air-water interface when air comes into contact with water.

d. Water is not subject to rapid temperature fluctuations because it can absorb or lose large amounts of heat with relatively small changes in temperature. Water temperature changes gradually in response to seasonal changes. Smaller water bodies are influenced by air temperature and sunlight more quickly than larger water bodies.

e. Water is the most dense at 4 degrees Celsius or 39 degrees Fahrenheit, and ice is formed at 0 degrees Celsius or 32 degrees Fahrenheit. This means that in winter, the coldest water is near the surface (i.e., the water closest to freezing), while the warmest water (i.e., the water that is densest at 4 degrees Celsius) is at the bottom. As noted, in summer the coldest water is at the bottom, and the warmest water is at the top of the lake. For a period of time each spring and fall, the lake is at a uniform temperature of 4 degrees Celsius from top to bottom. These times when the whole water column mixes together is called "turnover."

20. The process within a lake that allows for the maintenance of a coldwater fishery is called "thermal stratification." Most northern temperate lakes, if they are deep enough, thermally stratify. Generally, a northern temperate lake must have a depth greater than 20 meters to thermally stratify. Beginning in early spring after ice-out, a lake's water temperature is uniform. In late spring and early summer, the combination of solar heating and

wind mixing of the lake's surface brings about the warming of the upper portion of the lake's water column. As the surface warms and mixes with the upper portion of the water, a temperature gradient is formed. At some point in the water column, this temperature gradient becomes great enough to where the warmer water at the top of the lake's water column (epilimnion) no longer mixes with the cooler bottom water (hypolimnion). This results in stratification of the lake into layers of water with different temperatures and densities. See Exhibit E, which illustrates lake stratification.

21. Summertime thermal stratification is caused when a warmer less dense layer of water (epilimnion) floats on a cooler, denser water layer (hypolimnion). These two layers are separated by a zone of rapidly changing water temperature and density, called the metalimnion. The metalimnion is a stratum or layer of water located in the middle part of the water column where thermal changes occur. Above and below the metalimnion are zones or layers of water that are more uniformly warm (epilimnion) and or uniformly cold (hypolimnion). The "thermocline" is located within the metalimnion, and is the horizontal plane of water in the lake subject to the greatest temperature change. The most important lake mixing mechanisms are wind, inflowing water, and outflowing water. Wind affects the surface waters of all lakes, but in deep lakes its ability to mix the entire water column is very limited. During the summertime, usually only shallow lakes are completely mixed by the wind (i.e., lakes not deep enough to have a hypolimnion). When a deeper lake's upper layer or epilimnion cools in the fall, the temperature controlling thermocline or metalimnion that separates the epilimnion and the hypolimnion breaks

down, and the water column mixes completely. In stratified lakes, the thickness of the epilimnion is the depth to which water is consistently mixed by the wind. How thick this layer becomes during the summer depends upon how resistant the water column is to mixing. The greater the temperature difference between the epilimnion and the hypolimnion the more wind energy is required to mix the water column completely to the bottom of the lake. The density of the water in the metalimnion acts as a physical barrier to the complete mixing of the epilimnion and hypolimnion.

22. In the spring, just after thermal stratification occurs, the maximum hypolimnetic volume for the summer season is established. The hypolimnion has high dissolved oxygen from spring mixing of the water column. However, because of the barrier properties of the thermocline, the hypolimnion is isolated from gas exchanges with the atmosphere during the summer, and it is often too dark for photosynthetic production of oxygen by algae.

23. The trophic state of a lake is a measurement of its biotic productivity. The range is from oligotrophic (unproductive) to eutrophic (productive) with a mid state called mesotrophic. Lake Sakakawea is mesotrophic, meaning it is moderately productive. See Exhibit E.

24. During summertime stratification, the hypolimnion can become oxygen-deficient as its reserves of dissolved oxygen are consumed by decomposition and respiration. The rate at which oxygen is depleted is directly related to the lake's trophic state. Unproductive oligotrophic lakes have a low rate of oxygen depletion, while productive eutrophic lakes have a higher rate of oxygen depletion in the hypoliminion. This event has very important consequences

for fishery management. Most fish require relatively high dissolved oxygen levels (greater than 5 milligrams per liter) and cannot survive in an oxygen-deficient hypolimnion. The epilimnion may be too warm, however, for the survival of coldwater species. This depletion of oxygen progresses throughout the summer, and becomes more pronounced in late August and early September. Thus, the period of time in late August and early September is the most critical to fishes that need cold water habitat to survive. That is when the oxygen level in the hypolimnion is most depleted and the cold water fishery is most vulnerable. Mark R. Deutschman's affidavit and report show that is the case for Lake Sakakawea, and that increased discharges from the lake must be managed to protect coldwater habitat at this critical time.

25. As the epilimnion cools in the late summer and early fall, the temperature difference between layers decreases and mixing more readily occurs. With the cooling of the surface, the mixing layer gradually extends downward until the entire water column has again mixed and becomes homogeneous. This destratification process is often referred to as the fall overturn or turnover.

26. In Lake Sakakawea, water is discharged from the bottom of the lake, so all discharges from the dam during the summer come from the hypolimnion except during flood events when the emergency spillway is used. Thus, the volume of the hypolimnion during summer months is steadily reduced resulting in decreased habitat for cold water fish. This reduction of cold water habitat continues until fall overturn. Another factor that reduces cold water fish habitat is oxygen depletion. The sinking of organic material from the epilimnion (algae, dead organisms, feces, etc.) through the metalimnion to the

hypolimnion occurs throughout the summer. These particles, which can be heavier than cold water, accumulate in the hypolimnion and subsequently decompose. This decomposition process consumes oxygen and, if ambient conditions fall to less than 5 milligrams per liter, the water becomes unsuitable for cold water fish.

Lake Sakakawea Data

27. The Department of Health has extensive water quality data on Lake Sakakawea. This effort began in 1992 and continues through the present time. The purpose of the monitoring was to establish a comprehensive limnological record for the lake. The Department gathered the data to develop a water quality model for the lake for use in lake management as well as for enforcement of state water quality standards.

28. Using these data, and data provided by the North Dakota Game and Fish Department (NDGF), the Department contracted with Houston Engineering to develop an empirical model to predict the annual minimum cold water fish habitat in Lake Sakakawea. Houston Engineering analyzed the data provided by the Department and the NDGF to estimate cold water fish habitat throughout the year. Houston then evaluated the variables that could be used to predict the minimum annual cold water fish habitat available in Lake Sakakawea each year. This effort resulted in a regression model that showed that two variables – the average May lake elevation, and the difference between inflow and outflow from June through September – can be used to predict the annual minimum cold water fish habitat. Corps management of the reservoir influences many water quality variables. The empirical

model clearly shows, however, that (1) when lake elevations are below approximately 1823 to 1825 msl at the outset of thermal stratification in May, and (2) excessive discharges from the dam occur from June to September, the volume of the hypolimnion falls below 800,000 acre-feet. At this level, the biological condition of the species dependent on cold water and sufficient oxygen become threatened, and the narrative standards that apply to the beneficial uses of Lake Sakakawea as a Class 1 lake are violated.

29. The response of biota and the biological web in Lake Sakakawea to environmental stressors cannot be delineated in absolute terms. Generally, individuals within a population vary substantially in their response to stressors, and the results are both cumulative and nonlinear. It usually involves an incremental process that includes, but is not limited to, reduced growth rates, diminished reproductive success, increased susceptibility to disease, and reduced vigor. Because of the intricacies of food web dynamics within a lake, the loss or decline of an organism can have profound negative impacts on another seemingly unrelated organism. What I can confidently say is that relatively conservative estimates must be made to ensure the survivability of the cold water fishery in Lake Sakakawea, and that when the volume of the cold water fishery habitat falls below 800,000 acre-feet at the critical late-summer period, water quality standards relating to dissolved oxygen, temperature, and designated beneficial uses are violated, and long-term or irreparable harm not only is threatened, but is likely, especially if sustained.

30. The maximum volume of the hypolimnion in Lake Sakakawea is established at the outset of stratification in May, and is constantly reduced throughout the

summer as discharges from the dam occur. If the combination of May reservoir elevation and discharges from the dam between June and September result in a hypolimnetic volume of 800,000 acre-feet or less, cold water aquatic life reaches a long-term damage threshold. And any further reductions in cold-water-habitat-volume below that level further exacerbates the deteriorating biological condition. In my professional opinion, the data, and Mr. Deutschman's modeling, both show that this is likely to occur at 800,000 acre-feet of cold water habitat or less.

31. The data derived from the Department's monitoring network on Lake Sakakawea and in the empirical model show that generally as reservoir levels drop, the volume of the hypolimnion is reduced, and, as a result, water quality within the hypolimnion deteriorates.

32. The water quality standards delineate specific numeric criteria to protect cold water aquatic life. Temperature criteria for cold water fish are 15 degrees Celsius and the maximum increase shall not be greater than 2.78 degrees Celsius above natural background conditions. Dissolved oxygen shall not be less than 5 milligrams per liter. The numeric criteria for these two variables must be achieved simultaneously in order to protect the Lake Sakakawea's designated uses. Conditions which result in a reduction in the cold water habitat below 800,000 acre-feet threaten and impair the lake's designated uses.

33. Again, the critical time for the volume of the hypolimnion is when the lake thermally stratifies in late May. Discharges from Garrison Dam are drawn from the hypolimnion and, therefore, its volume is reduced throughout the summer. Temperatures less than 15 degrees Celsius and dissolved oxygen concentration greater than 5 milligrams per

liter must be maintained in order to comply with North Dakota State Water Quality Standards. A combination of average May lake elevation and summer discharge must be sufficient to provide for a minimum cold water habitat volume of 800,000 acre-feet or greater to maintain the lake's beneficial uses. A volume of less than 800,000 acre-feet at the critical late-summer period violates the numeric and narrative water quality standards I have discussed because sufficient volume in the hypolimnion will not exist to protect and maintain the lake's beneficial uses.

34. The higher the elevation of Lake Sakakawea in late May (e.g., 1825 msl), the more flexibility the Corps will have in making summer discharges that will not violate North Dakota's Water Quality standards. The lower the starting elevation when the lake stratifies in late May, the lower the initial volume of the hypolimnion, and the greater the amount that discharges must be limited to avoid water quality violations. See affidavit and report of Mark R. Deutschman.

Dated this 21 day of April, 2003.

/s/ Michael T. Sauer
Michael T. Sauer

Subscribed and sworn to before me
this 21st day of April, 2003.

/s/ Kim R. Grenz
Notary Public

KIM R. GRENZ
Notary Public
State of North Dakota
My Commission Expires
Sept. 28, 2007

U.S. District Court, State of North Dakota

Affidavit of Todd S. Sando (Apr. 17, 2003) (pp. 3-4)

* * *

Peck Lake. The largest of these reservoirs is Lake Sakakawea, with a storage capacity of 23.8 MAF or 32% of the total system storage. Lake Oahe is nearly as large with a storage capacity of 23.1 MAF or 31% of the total system storage. Fort Peck Lake has a storage capacity of 18.7 MAF or 25% of the total system storage. The three most downstream reservoirs (Lake Sharp, Lake Francis Case, and Lewis and Clark Lake) have a combined storage capacity of 7.8 MAF or approximately 12% of the total system storage. Attachment 3.

12. The Corps acquired over 2,500 square miles of land to allow construction of the six dams, more area than the State of Delaware. Montana lost approximately 588,000 acres, North Dakota 550,000 acres, South Dakota 520,000 acres, and Nebraska 10,000 acres.

13. The operation of the dams is guided by the Missouri River Master Water Control Manual (Master Manual). The Master Manual records the basic water control plan and objectives for the integrated operation of the mainstem reservoirs. The Master Manual was first published in December 1960 and was later revised in 1973, 1975, and 1979. In November 1989, a revision to the Master Manual was initiated in response to the drought that began in 1987, as it became obvious that an operating plan that had remained virtually unchanged since 1960 did not meet the contempora[illegible] needs of the basin. In addition, the drought of the late 1980's and early 1990's was the first major drought in the basin since the reservoir system initially filled. The operation of the system during that drought demonstrated that the theoretical

provisions in the Master Manual were not adequate to address the harm of an actual drought. **This is evident from the fact that the Corps did take conservation measures beyond those described in the Master Manual during the drought of the late 1980's and early 1990's.**

14. The Missouri River Basin Association (MRBA) is a coalition of Governor-appointed representatives from each of eight Missouri River Basin states (Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, and Wyoming) and the Executive Director of the Mni Sose Tribal Water Rights Coalition. In November 1999 the MRBA provided recommendations to the Corps for a preferred alternative selection in the Revised Draft Environmental Impact Statement, which was scheduled to be published in early 2000. Seven of the eight MRBA member states supported these recommendations at that time, and continue to support them. Included in these recommendations were conservation measures to provide a more equitable distribution of hardship during a drought such as the one the basin experienced in the late 80's and early 90's and like the one the basin is currently experiencing. The conservation measures provided in these recommendations would begin to conserve water earlier in a drought, thereby making that water available to all uses as a prolonged drought continues. The conservation measures supported by the majority of MRBA states would avoid, when possible, consecutive years of minimum service release for navigation and maintaining, when possible, a navigation season of at least 7.1 months. These recommendations formed the basis of the Northwestern Division's Preferred Alternative that was announced in January 2000. The conservation measures are also included

in all of the alternatives, except the current water control plan, described in the August 2001 *Missouri River Master Water Control Manual Review and Update Revised Draft Environmental Impact Statement.*

15. The Corps has indicated that its April runoff forecast for 2003 is 20.0 million acre-feet (MAF), 80% of the normal runoff. Attachment 4. The Corps' "Most Likely Runoff Simulation" indicates that Lake Sakakawea will reach an elevation of 1822.5 feet mean sea level (msl.) by the end of June, falling to an elevation of 1820.8 feet msl. by the end of September. Attachment 5. This simulation also shows the system storage dropping to 40.7 MAF by the end of the year. This would be a record low system storage since the System initially filled. The previous minimum system storage was 40.8 MAF which occurred during the last drought on January 9, 1991. Attachment 6.

16. The Missouri River basin is in the fourth year of a drought, as shown by the four consecutive years of below median runoff above Sioux City, Iowa. Attachment 7. The Corps has records of the inflow to the Missouri River above Sioux City dating back to 1898. These records are adjusted so the water removed from the system for various uses, referred to as depletions, are constant with the level of development that existed in 1949 for all the years in the record. This record shows four drought periods; 1930 through 1941, 1954 through 1961, 1987 through 1992, and 2000 to the present. The first of these droughts occurred prior to the System being constructed. The second drought occurred during construction and initial filling of the reservoirs.

17. Due to delays in completing the Master Manual revision, the Corps continues to operate according to the current outdated Master Manual. Had the conservation

measures recommended by the MRBA been in place during the current drought approximately 4 MAF of water would have been conserved throughout the System. The following discussion compares the Corps' actual operation of the Missouri River System to how the System would have been operated during the current drought had the recommended conservation measures been in effect. The benefit of the water saved by the recommended conservation measures on Lake Sakakawea is determined by calculating the reservoir elevations had the recommended conservation measures been in place.

18. The recommended conservation measures establish releases for navigation based on system storage volumes of 54.5 MAF on March 15 and 59.0 MAF on July 1. If the system storage volume does not meet the above criteria, releases for navigation are to be reduced by 3,000 cubic feet per second (cfs) and the season length reduced by 27 days at the end of the navigation season resulting in a 7.1 month season. The recommended conservation measures also include criteria for a severe drought, defined as a year in which there is no gain in total system storage between March 15 and July 1. The severe drought criteria reduces navigation releases by 6,000 cfs from July 1 to the end of the 7.1 month season, and from the beginning of the following season until August 20 of that season.

19. In contrast to the recommended conservation measures, the existing Master Manual criteria provide full service navigation if system storage on March 15

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U.S. District Court, State of North Dakota

Corrected Supplemental Affidavit of Todd S. Sando (May 8, 2003) p. 4

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from Gavins Point Dam than anticipated on April 1." Unfortunately, this statement is inaccurate. The April 1 forecast anticipated an average monthly discharge from Gavins Point Dam of 27,700 cfs. This monthly average assumed steady releases of 30,000 cfs starting in mid-May for the remainder of the month. Assuming the discharge was intended to be increased on May 15 and the discharge was steady prior to the increase, the current releases were anticipated to be 25,400 cfs, not the 30,000 cfs used to calculate the 4,000 cfs reduction. This error appears to be a result of forecasting in hindsight. The Corps initiated the steady release on April 28, 2003, and therefore is now stating that without the changes made by the Additional Supplemental Biological Assessment on April 21 the releases in May would have been steady at 30,000 cfs. While it is true that had the steady release not been reduced from 30,000 cfs to 26,000 cfs and had the Corps initiated the steady release on the same day the releases would currently be 30,000 cfs, this is not what was anticipated on April 1.

17. The Master Manual establishes navigation flow targets for full service and minimum service as shown in Table 1. This table also includes the present flow at these locations as reported by the Corps' Missouri River Region Daily River Bulletin dated May 7, 2003.

Table 1
Navigation Flow Targets

Location	River Mile	Full Service (cfs)	Minimum Service (cfs)	Present Flow (cfs)
Sioux City	732	31,000	25,000	28,800
Omaha	616	31,000	25,000	38,600
Nebraska City	563	37,000	31,000	52,600
Kansas City	366	41,000	35,000	58,300

18. The Corps' May 7, 2003, Missouri River Barge Traffic Report shows six towboats with barges on the Missouri River. Attachment 2. Only one of these six tows reports a location or destination above Kansas City. The sixth boat, the "Jack Flahaut", reports a destination of the river mile 648, approximately 32 miles upstream of Omaha. As shown in Table 1, the five boats below Kansas City have flows well above the full service level for navigation. The sixth boat as it moves upstream of Omaha, may experience flows slightly below full service for navigation but still well above the minimum service target level. Currently, discharges from Gavins Point Dam could be substantially reduced without impacting the towboats on the river.

19. The Declaration of Lawrence J. Cieslik at paragraph 19 states, "[a] river fall of several feet . . . " This seems to imply that the reductions in releases

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**Summary of Engineering Data –
Missouri River Main Stem Reservoirs**

[Chart Found In Pocket On Inside Back Cover]

Summary of Engineering Data - Missouri River Main Stem Reservoirs

Item No.	Subject	Fort Peck Lake	Garrison Dam - Lake Sakakawea	Oahe Dam - Lake Oahe	Big Bend Dam - Lake Sharpe	Fort Randall Dam - Lake Francis Case	Gavins Point Dam - Lewis & Clark Lake	Total	Item No.	Remarks
1	Location of Dam	Near Glasgow, Montana	Near Garrison, ND	Near Pierre, SD	32 miles upstream Chamberlain	Near Lake Andes, SD	Near Yankton, SD		1	(1) Includes 47,000 square miles of non-contributing area.
2	River Miles - Mo River	Mile 1771.5	Mile 1389.9	Mile 1072.3	Mile 987.6	Mile 880.1	Mile 811.1		2	(2) Includes 1,200 square miles of non-contributing area.
3	Total & uncontrolled drainage areas in square miles	57,500	181,400 (2) 123,900	243,490 (2) 62,090	249,330 (2) 5,840	263,480 (2) 14,150	279,480 (2) 16,000		3	(3) With peak at base of flood control.
4	Approximate length of full reservoir in miles (mi)	134, ending near Zortman, MT	178, ending near Tioga, ND	231, ending near Mobridge, SD	80, ending near Pierre, SD	107, ending at Big Bend Dam	25, ending near Yankton, NE	755 miles	4	(4) Storage first available for regulation of flows.
5	Elevations in msl (3)	2160 (elevation 2234)	1,840 (elevation 1837.5)	1620 (elevation 1607.5)	1420 (elevation 1420)	1040 (elevation 1350)	966 elevation (1204.5)	1,840 max	5	(5) Conservation height is height from low water to maximum operating pool. Maximum height is from average stream bed to top of dam.
6	Average annual & conservation inflow in cfs	11,200	25,600 15,400	28,100 3,300	28,100	30,000 1,900	32,000 2,000		6	(6) Based on latest available storage data.
7	Max. discharge of record and non-damage in cfs	137,000 (June 1953)	340,000 (April 1952)	440,000 (April 1952)	440,000 (April 1952)	447,000 (April 1952)	480,000 (April 1952)		7	(7) Power regulation is attained by flows over low-crested spillway and through turbines.
8	Construction started - impounding yr	1933	1946	1948	1959	1946	1952		8	(8) Length from upstream face of earth dam to upstream face.
9	In operation - 1st unit, yr.	1940	1955	1962	1964	1953	1955		9	(9) Based on 50-year (1902) drought of record. (Years study 1-65-1965).
	Dam and Embankment									
10	Top of dam elevation in feet msl	2280.5	1875	1660	1440	1395	1234		10	(10) A Record by level of Lake Francis case. Applicable to period of elevation 1350.
11	Length of dam in feet	21,026 (excluding spillway)	14,300 (excluding spillway)	9,360 (excluding spillway)	10,570 (excluding spillway)	10,700 (excluding spillway)	8,700 (excluding spillway)	74,356	11	(11) Top Dam crest.
12	Downstream height in feet (3)	220	180	200	75	140	65	960 Feet	12	(12) 1967-2000 Average
13	Maximum height in feet (3)	250.5	210	245	95	165	74		13	(13) Source: Annual Report on Civil Works Activities of the Corps of Engineers, External Report Fiscal Year 1999.
14	Main dam - earth, rock & concrete in cu. yds.	59,532, 2720	66,400, 2850	77,000, 1500	2,835, 7800	49,900, 1250	8,700, 4500		14	
15	Abutment formations (erosion dams & embankments)	Sandstone shales and glacial fill	Pierre Shale clay shales	Pierre shale	Pierre shales & Niobrara chalk	Niobrara chalk	Niobrara chalk & Carlile shale		15	
16	Type of fill	Hydraulic & related earth fill	Modified earth fill/rock	Modified earth fill & shales/mixtures	Modified earth, shale, chalk fill	Modified earth fill & chalk/mixtures	Modified earth & chalk fill		16	
17	Fill quantity, cubic yards	125,628,000	66,300,000	55,000,000 & 77,000,000	17,000,000	28,000,000 & 22,000,000	7,000,000	250,328,000 cu. yds.	17	
18	Volume of concrete (cubic yards)	1,000,000	1,900,000	1,000,000	540,000	900,000	300,000	6,534,000 cu. yds.	18	
19	Date of Closure	24 June 1937	15 April 1953	3 August 1958	28 July 1963	20 July 1952	31 July 1955		19	
	Spillway Data									
20	Location	Right bank - remote	Left bank - adjacent	Right bank - remote	Left bank - adjacent	Left bank - adjacent	Right bank - adjacent		20	
21	Crest elevation in feet msl	2225	1825	1596.5	1365	1046	1180		21	
22	Width (excluding piers) in feet	1000 gated	1396 gated	1000 gated	1396 gated	1000 gated	660 gated		22	(14) Spillway crest.
23	No., size and type of gates	14 - 40' x 20' vertical lift gates	28 - 40' x 38' Tainter	8 - 50' x 33.5' Tainter	8 - 42' x 30' Tainter	21 - 40' x 38' Tainter	14 - 40' x 30' Tainter		23	(15) 1967-2000 Average
24	Design discharge capacity, cfs	275,000 at elev 2253.3	1027,000 at elev 1830.5	1094,000 at elev 1644.4	1190,000 at elev 1433.4	1028,000 at elev 1379.3	1066,000 at elev 1225.4		24	(16) Source: Annual Report on Civil Works Activities of the Corps of Engineers, External Report Fiscal Year 1999.
25	Discharge capacity at maximum operating pool in cfs	230,000	660,000	280,000	270,000	300,000	345,000		25	
	Reservoir Data (4)									
26	Max. operating pool elev. & area	2250 msl 246,000 acres	1854 msl 366,000 acres	1620 msl 374,000 acres	1420 msl 61,000 acres	1375 msl 952,000 acres	1210 msl 31,000 acres	1,994,000 acres	26	
27	Max. normal op pool elev. & area	2246 msl 245,900 acres	1854 msl 364,000 acres	1607.5 msl 360,000 acres	1420 msl 44,200 acres	1365 msl 95,000 acres	1208 msl 28,000 acres	1,147,100 acres	27	
28	Mean flood control elev. & area	2234 msl 212,000 acres	1837.5 msl 307,000 acres	1607.5 msl 312,000 acres	1416 msl 57,600 acres	1350 msl 77,000 acres	1204.5 msl 24,000 acres	909,000 acres	28	
29	Min. op pool elev. & area	2160 msl 98,000 acres	1775 msl 128,000 acres	1540 msl 117,000 acres	1415 msl 51,000 acres	1320 msl 38,000 acres	1204.5 msl 24,000 acres	456,000 acres	29	
	Storage allocation & capacity									
30	Exclusive flood control	2250-2246 977,000 a.f.	1854-1850 1,481,000 a.f.	1620-1617 1,002,000 a.f.	1420-1422 42,000 a.f.	1375-1365 905,000 a.f.	1210-1208 59,000 a.f.	4,470,000 a.f.	30	
31	Flood control & multiple use	2246-2234 2,777,000 a.f.	1850-1837.5 4,222,000 a.f.	1617-1607.5 1,301,000 a.f.	1422-1420 117,000 a.f.	1365-1350 1,319,000 a.f.	1208-1204.5 99,000 a.f.	11,456,000 a.f.	31	
32	Carryover multiple use	2234-2160 10,700,000 a.f.	1837.5-1775 11,130,000 a.f.	1607.5-1540 13,461,000 a.f.		1350-1320 1,677,000 a.f.		36,968,000 a.f.	32	
33	Permanent	2160-2050 4,211,000 a.f.	1775-1675 4,980,000 a.f.	1540-1415 5,177,000 a.f.	1420-1365 1,602,000 a.f.	1320-1240 1,517,000 a.f.	1204.5-1160 221,000 a.f.	18,896,000 a.f.	33	
34	Gross	2250-2050 18,668,900 a.f.	1854-1675 23,827,000 a.f.	1620-1415 23,177,000 a.f.	1420-1365 1,859,000 a.f.	1375-1240 5,418,000 a.f.	1210-1160 478,000 a.f.	77,393,000 a.f.	34	
35	Reservoir Filling started	November 1937	December 1953	August 1958	November 1963	January 1953	August 1953		35	
36	Initially reached max. operating pool	22 May 1942	7 August 1967	3 April 1962	21 March 1966	24 November 1952	22 December 1955		36	
37	Estimated annual sediment inflow	18,300 a.f. 0.01%	23,500 a.f. 0.1%	99,000 a.f. 0.17%	64,300 a.f. 4.0%	18,500 a.f. 2.0%	2,600 a.f. 1.0%	92,300 a.f.	37	
	Outlet Works Data									
38	Location	Right bank	Right Bank	Right Bank		Left Bank			38	
39	Number and size of conduits	2 - 24'0" diameter (max. 3 & 0	6 - 30' dia. and 2 - 22' dia.	6 - 20.5' dia. upstream, 18.25' dia. downstream	None (7)	4 - 22' diameter	None (7)		39	
40	Length of conduits in feet (8)	No. 3 - 6,013, No. 4 - 7,240	1520	1498 to 1650		1023			40	
41	No., size, and type of service gates	1 - 20' dia. cylindrical gate 4 gates, 7.6 x 8.5 height gate operating in conduit control shaft	1 - 18' x 20.5' Tainter gate per conduit for flow regulation	2 - 21' x 22' gate conduit, vertical lift, 4 radial compressor and 2 hydraulic compressor. Gates regulated		2 - 17' x 22' gate conduit, vertical lift, radial compression			41	
42	Conservation sluice elevation (msl)	2095	1672	1525	1330 (11)	1229	1180 (11)		42	
43	Avg. discharge capacity per conduit & total	Elev. 2250 22,500 cfs - 45,000 cfs	Elev. 1854 30,400 cfs - 91,000 cfs	Elev. 1620 10,500 cfs - 111,000 cfs		Elev. 1375 22,000 cfs - 132,000 cfs			43	
44	Penstock inadvertent elevation (2 msl)	1810-2036 5,000 - 35,000 cfs	1670-1680 30,000-90,000 cfs	1423-1458 10,000-92,000 cfs	1251-1255 (8) 25,000-140,000 cfs	1226-1239 (10) 44,000 cfs	1155-1165 (10) 44,000 cfs		44	
	Power Penstocks and Data									
45	Avg. ground level msl in feet (12)	1944	1661	1334	1230	1117	1041	1764 feet	45	
46	Number and size of conduits	No. 1-30'0" dia., No. 2-22'0" dia.	6 - 30' dia., 22' penstocks	8 - 24' dia., embedded penstocks	None - direct intake	8 - 28' dia., 22' penstocks	None - direct intake		46	
47	Length of conduits in feet (8)	No. 1 - 5,653, No. 2 - 6,331	1829	From 1,500 to 4,800		1,854		959,000	47	
48	Surge tanks	#1&2: 3-40' dia., #3&4: 2-45' dia.	4th dia. - 2 per penstock	372' dia., 2 per penstock	None	4th dia., 1 per intermediate penstock	None		48	
49	No., type and speed of turbines	4 Francis, #1&2-2: 120.5 rpm, 2 other type, #3&4-2: 128.6 rpm	6 Francis, Vertical	8 Francis, 130 rpm	8 Fixed blade, 81.8 rpm	8 Francis, 85.7 rpm	3 Kaplan, 75 rpm	256 units	49	
50	Dischg. cap. of install turbine in cfs	#1&2: each 18.3 17?, 2 - 40 8,000 cfs, #3&4: 2-45 18?, 2 - 20 cfs	5 @ 41,000 cfs	2 @ 54,000 cfs	7 @ 110,900 cfs	2 @ 44,500 cfs	3 @ 36,000 cfs		50	
51	Generator name plate rating in kW	43.5, 50, 2 - 10, 250, 43.5 - 40, 000	5 - 109,250, 1 - 95,000	112,250	5 - 65,250, 3 - 50,000	40,000	44,000		51	
52	Plant capacity in kW	185,250	547,750	786,000	404,250	320,000	132,000	2,455,000 kw	52	
53	Dependable capacity in kW (9)	181,000	520,000	634,000	445,000	295,000	94,000	1,967,000 kw	53	
54	Avg annual energy, million kWh (13)	1,116	2,462	2,295	1,254	1,102	578	10,197 million kWh	54	Corps of Engineers, U.S. Army
55	Initial generation, first unit operated	July 1943 - June 1961	January 1956 - October 1960	April 1962 - June 1963	October 1964 - July 1966	March 1954 - January 1956	September 1956 - January 1957	July 1943 - July 1966	55	Compiled by Missouri River Division August 2000
56	Estimated cost, September 1999 Completed projects (15)	$184,428,000	$345,274,000	$246,321,000	$107,998,000	$199,264,000	$41,117,000	$1,161,068,000	56	

No. 05-628

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

STATE OF NORTH DAKOTA, THROUGH THE NORTH DAKOTA DEPARTMENT OF HEALTH, AN AGENCY OF THE STATE OF NORTH DAKOTA; JOHN HOEVEN, GOVERNOR; WAYNE STENEHJEM, NORTH DAKOTA ATTORNEY GENERAL, EX REL. STATE OF NORTH DAKOTA; NORTH DAKOTA DEPARTMENT OF HEALTH,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, A FEDERAL AGENCY; GREGG F. MARTIN, DIVISION COMMANDER, NW DIVISION, PORTLAND, OREGON, UNITED STATES ARMY CORPS OF ENGINEERS; JEFFREY BEDEY, COLONEL, DISTRICT ENGINEER, OMAHA DISTRICT, STATE OF NEBRASKA, STATE OF MISSOURI, STATE OF SOUTH DAKOTA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JON C. BRUNING
Attorney General
DAVID D. COOKSON
Counsel of Record
Assistant Attorney General
State of Nebraska
State Capitol, #2115
Lincoln, Nebraska 68509
(402) 471-2682

DONALD G. BLANKENAU
THOMAS R. WILMOTH
Special Assistant
Attorneys General
FENNEMORE CRAIG, P.C.
206 South 13th Street,
Suite 1400
Lincoln, Nebraska 68508-2019
(402) 323-6200

Attorneys for State of Nebraska

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15, the State of Nebraska ("Nebraska") submits its brief in opposition to the Petition for Writ of Certiorari (the "Petition") filed by the State of North Dakota ("North Dakota"). In its Petition, North Dakota misstates the issues ruled on below and misrepresents the facts of this case. The Eighth Circuit Court of Appeals focused its ruling below on whether Congress, under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* ("CWA"), preserved sovereign immunity for the United States Army Corps of Engineers ("Corps") "when the Corps' authority to maintain navigation is at issue." *In re Operation of the Missouri River System Litigation*, 418 F.3d 915, 917 (8th Cir. 2005).

OBJECTION TO CONSIDERATION OF THE QUESTIONS PRESENTED

Pursuant to Supreme Court Rule 15.2, Nebraska objects to the Question Presented because it was not pressed or passed upon below. The Appeals Court did not consider whether the Corps was universally "exempt" from CWA compliance. Rather, the Appeals Court held the doctrines of preemption and sovereign immunity discharge the Corps "from complying with the CWA when its authority to maintain navigation would be affected." 418 F.3d at 918.

STATEMENT OF THE CASE

I. MISSOURI RIVER MAINSTEM DAM AND RESERVOIR OPERATIONS.

Enacted under the navigation authority of the Commerce Clause, U.S. Const. Art. I, § 8, cl.3, the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944) ("FCA"), authorized the construction and operation of dams and reservoirs by the Corps on the main stem of the Missouri River. Congress made flood control and navigation the "dominant function" for which the Secretary of War was to manage the system. *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512, 108 S.Ct. 805, 815 (1988); *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1029 (8th Cir. 2003), *cert. denied*, 541 U.S. 987, 124 S.Ct. 2015 (2004). In addition to flood control and navigation, the main stem dams and reservoir system provides a wide range of other benefits to each of the Missouri River Basin states. Authorized project purposes in addition to flood control and navigation include water supply, power generation, irrigation, recreation and fish and wildlife. *E.g.*, S. DOC. NO. 247, 78th Cong., 2nd Sess. (1944) at 3. In adopting the FCA, Congress recognized that the amount of water in storage behind each of the dams would fluctuate from year-to-year based on precipitation and the need to meet authorized downstream uses, for which water from the reservoirs would be released. *Id.* at 3-4. To serve the authorized purposes of the project, the dams are not operated in isolation, but rather in concert as an integrated system.

To implement the provisions of the FCA, the Corps adopted regulations in accordance with Section 7 of the FCA, now codified at 33 U.S.C. § 709, requiring the establishment of "water control plans" for all Corps projects,

and the preparation of "master manuals" where several projects within a drainage have interrelated purposes. 33 C.F.R. § 222.5(a) & (i)(2). The Corps adopted the Missouri River Main Stem Reservoir System Reservoir Regulation Manual ("Master Manual") in 1960 and made revisions to it in 1975, 1979 and 2004. The Master Manual represents the regulatory framework within which the Corps must act to achieve the multiple authorized purposes. *Ubbelohde*, 330 F.3d at 1028 ("[W]e conclude that the Master Manual is binding on the Corps. . . .")

In addition to its primary navigation and flood control mandates, the FCA also required the Corps to produce hydropower from the main stem dams to provide affordable electric power over a multi-state region to offset the enormous cost of dam construction. Section 5 of the FCA states: "Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles . . . " *See also* S. DOC. NO. 247 at 1, 3-4. In view of this obligation, the Corps has placed a high priority on the production of hydropower, which is marketed throughout the Missouri River Basin by a separate federal agency, the Western Area Power Administration ("WAPA").

Since 1960, significant economic development has occurred along the Missouri River that is dependant upon the water management regime established by the FCA as interpreted in *ETSI* and *Ubbelohde*. That flow regime supports a wide range of economic activities along the

River. Municipalities, private industry and power producers have constructed extensive infrastructure designed to utilize the Missouri River in direct reliance on the flow regime reflected in the Corps' master manuals. In 2002, the National Academy of Sciences highlighted the importance of the Missouri River as a source of supply for municipal and industrial uses. NATIONAL ACADEMY PRESS, THE MISSOURI RIVER ECOSYSTEM: EXPLORING THE PROSPECTS FOR RECOVERY (2002). The water supply benefits of the Missouri River "accrue at intakes for thermal power plants and at municipal, irrigation, commercial/industrial, domestic and public water intakes so long as daily flows exceed minimum elevation requirements for water intakes." *Id.* at 93.

Nebraska historically has received the largest share of water supply benefits from Corps operations. In 1994 for instance, annual water supply benefits from the River totaled $571,600,000. *Id.* Water supply benefits "are concentrated in the thermal generating activities in Nebraska and Iowa." *Id.* Of the total water supply benefits accruing to the Basin, Nebraska receives 44.8%, or approximately $256,000,000 annually in 1994 dollars. *Id.* at 94. Hydropower benefits, measured by the costs of alternative supplies have an annualized value of $615,000,000. *Id.* at 97. Of that benefit, Nebraska received 27.3%, or approximately $168,000,000. *Id.*

As impressive as these figures are, most impressive is the $18,000,000,000 in total flood damage prevented as of 1998 as a result of the FCA. *Id.* at 99. Nebraska alone receives over $77,000,000 annually in flood control benefits. *Id.* at 100. This figure only accounts for property damage and cannot quantify the value of lives saved by the Corps' operations.

In Nebraska alone, four publicly owned thermal power plants rely on the flow regime established by the FCA and implemented through the Master Manual. The River represents the plants' sole source of water for cooling purposes. These plants will be forced to curtail production of electricity or even shut down entirely if the Corps fails to release water from upstream reservoirs as required under the FCA. Retention of water upstream in violation of the FCA also will decrease the amount and timing of hydropower generated at the main stem facilities and available for purchase from WAPA. Because Nebraska utilities typically purchase more WAPA power than the utilities of other Basin states, Nebraska power consumers will be disproportionately impacted by any reduction in hydropower production.[1] Nevertheless, other Missouri River Basin states are similarly reliant on the River and WAPA hydropower. Thus, the entire region could be impacted adversely by any improper retention of water in upstream reservoirs.

Finally, the FCA authorized fishing and other recreational pursuits at the main stem reservoirs on certain conditions. Section 4 of the FCA states: "The water areas of all such reservoirs shall be open to public use generally without charge, for boating, swimming, bathing, fishing and other recreational purposes . . . when such use is determined by the Secretary of War not to be contrary to the public interest." *Id.* Accordingly, the Corps has attempted to

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[1] The Nebraska Public Power District, for example, consistently ranks among WAPA's top ten purchasers of firm energy. WESTERN AREA POWER ADMINISTRATION, ANNUAL REPORT (2004), STATISTICAL APPENDIX (SYSTEM DATA) at 30.

accommodate such uses whenever possible and makes such allowances in the Master Manual.

II. HISTORY OF THE PRESENT CASE AND ISSUES PRESENTED TO AND DECIDED BY THE EIGHTH CIRCUIT COURT OF APPEALS.

In the 1970s, North Dakota introduced certain species into Lake Sakakawea for recreational fishing. These species include the rainbow smelt, Chinook salmon, and walleye. These species are not native to the Missouri River and are dependant upon the habitat created by the dam in Lake Sakakawea. The reservoir's depth allows for the creation of cold water habitat necessary for these species to flourish. Without the dam, these species would not exist in the Missouri River.

In the spring of 2002, North Dakota obtained injunctive relief from the District Court for the District of North Dakota precluding the Corps from releasing water from the dam in accordance with the 1979 Master Manual. *See Ubbelohde*, 330 F.3d. at 1021-22. North Dakota based this case on its contention that irreparable harm would be done to the rainbow smelt population that year if the lake level was lowered during the smelt spawn. *See* Petition at 9-10. The Eighth Circuit Court of Appeals, relying on this Court's holding in *ETSI*, reversed the North Dakota Court and required the Corps to comply with the Master Manual. *Ubbelohde*, 330 F.3d at 1033.

Unable to obtain effective relief in 2002, North Dakota developed a novel legal theory to prevent the Corps from releasing water from Lake Sakakawea. In March of 2003, the North Dakota Legislature adopted an "emergency measure" to redefine activities subject to the CWA. The

North Dakota Legislature first made it unlawful for the Corps to "otherwise cause pollution," the key phrase on which North Dakota based its claim. The North Dakota Legislature also changed state law to ensure that injunctive relief against the Corps would also be available for violations of its CWA standards. One month after passage of this legislation, North Dakota initiated the proceedings below.

The U.S. District Court for the District of Minnesota, to whom this action was transferred as part of *In re Operation of the Missouri River System Litigation*, 277 F. Supp. 2d 1378 (J.P.M.L. 2003), held, consistent with *Ubbelohde*:

> The Corps must operate the Missouri River to control flooding and maintain downstream navigation. *ETSI Pipeline Project v. Missouri*, 484 U.S. 493, 512 (1988); *see* 33 U.S.C. 701 *et seq.* (Flood Control Act ("FCA")); *see also* H.R. Doc No. 475, 78th Cong., 2d Sess. 3 (1944). . . . Here, the Corps is faced with an either-or situation: it can either comply with North Dakota's water quality standards and potentially violate its statutory obligation under the FCA to maintain navigation, or it can operate as required under the FCA and potentially violate North Dakota's water quality standards. Although it is possible that the Corps may be able to simultaneously meet both its obligations to maintain navigation and the water quality standards established by North Dakota, the Court simply cannot require the Corps to always do both. In this instance, water quality standards that require specific water levels and gas compositions in a reservoir that segments a major river system that traverses multiple states affects the Corps' ability to maintain navigation.

> Therefore, in this instance, the Court finds that the CWA does not provide for a complete waiver of sovereign immunity.

In Re Operation of the Missouri River System Litigation, 320 F. Supp. 2d 873, 877 (D. Minn. 2004). North Dakota appealed the court's ruling to the Eighth Circuit Court of Appeals.

The Eighth Circuit upheld the district court explaining: "North Dakota cannot enforce its state water quality standards against the Corps, a federal agency, unless Congress has unequivocally waived the federal government's sovereign immunity from suit." 418 F.3d at 917. The Eighth Circuit continued, noting:

> On its face, [33 U.S.C.] § 1371(a) exempts the Corps, which operates under the authority of the Secretary of the Army, from complying with the CWA when its authority to maintain navigation would be affected. It is also clear from the face of North Dakota's complaint that North Dakota is attempting to use its water-quality standards to affect the Corps' authority to release water from Lake Sakakawea to support navigation. There are no exceptional circumstances here to indicate that Congress would not have intended the § 1371(a) "navigation exception" to the waiver of sovereign immunity to apply in this case.

Id. at 918.

Accordingly, this appeal concerns the issue of whether Congress waived sovereign immunity with respect to the operation of reservoirs under the CWA when navigation is negatively implicated.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 states "[a] petition for writ of certiorari will be granted only for compelling reasons." The Rule illuminates the "character of the reasons" a petition might be granted, including the existence of a conflict between the circuit courts, of a conflict created by a state supreme court decision, or a decision determining an important Federal question for the first time or in a manner contrary to this Court's prior decisions. *Id.* North Dakota's Petition contains none of these characteristics.

As explained below, the Eighth Circuit Court of Appeals correctly decided the discrete issue before it. The decision below is consistent with this Court's prior decisions and created no conflict between the circuits. North Dakota improperly seeks to expand this Court's review beyond the issues decided below and effectively requests this Court to apportion the flows of the Missouri River without regard to congressional intent reflected in the FCA. A petition for certiorari is not the appropriate vehicle for North Dakota's cause.

I. THE QUESTION PRESENTED BY NORTH DAKOTA WAS NOT PASSED UPON BELOW.

The "traditional rule" of this Court precludes a grant of certiorari when the question presented by the petitioner "was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41, 112 S.Ct. 1735, 1738 (1992). The question presented in North Dakota's Petition consists primarily of argument and an actual question is not easily discernable. The "question presented" from North Dakota's perspective appears to be: "Whether the court below erred in holding as a matter of law that the Clean Water Act

exempts the Corps of Engineers from complying with water quality standards North Dakota is required to enact under § 303(c) of the Act?" Petition at (ii). This question improperly and incorrectly states the issue decided by the Court of Appeals.

The Court of Appeals considered whether Congress had preserved sovereign immunity under the CWA in a very narrow circumstance. Contrary to North Dakota's characterization, the Appeals Court did not consider whether the Corps was universally "exempt" from CWA compliance. The decision below represents a straightforward application of 33 U.S.C. § 1371(a) and, to the extent necessary, consideration of preemption principles. North Dakota failed to cite any case law or constitutional principle to explain how the Appeals Court erred in its analysis.

II. THE ISSUE ACTUALLY PRESENTED BELOW WAS CORRECTLY DECIDED.

A. Waiver of Sovereign Immunity.

The Appeals Court correctly affirmed dismissal of North Dakota's complaint by the district court. Lake Sakakawea and the other main stem reservoirs were constructed pursuant to the navigation powers within the Commerce Clause, U.S. Const. Art. I, § 8, cl.3. By such authority, Congress set forth its plans for the Missouri River in the FCA. The FCA requires the Corps to operate the main stem dams to control flooding and maintain navigation and to provide additional secondary benefits. The establishment of flood control and navigation as priorities for the Corps was noted by this Court in *ETSI*, 484 U.S. at 5[illegible]2, 108 S.Ct. at 815 and by the Eighth Circuit in *Ubbelohde*, 330 F.3d at 1019-20. Together those cases

effectively constitute the "law of the Missouri River." North Dakota is now effectively asking this Court to reverse the holdings in those cases and allow the interests of a single state to undercut the FCA.

In *United States v. Appalachian Electric Power Company*, 311 U.S. 377, 61 S.Ct. 291 (1940), this Court examined the limitations of state authority to regulate dams vis-à-vis the federal government's power to regulate navigation stating: "The states possess control of the waters within their borders, 'subject to the acknowledged jurisdiction of the United States under the constitution in regard to commerce and the navigation of the waters of rivers.'" *Id.* at 405, 61 S.Ct. at 298. In *United States v. Cherokee Nation*, 480 U.S. 700, 107 S.Ct. 1487 (1987), this Court noted the unique aspect of navigation within the Commerce Clause stating, "there can be no doubt that '[t]he Commerce Clause confers a unique position upon the Government in connection with navigable waters,'" giving it a "'dominant servitude,' . . . which extends to the entire stream and the stream bed below ordinary high-water mark." *Id.* at 704, 107 S.Ct. at 1489 (internal citations omitted). This Court further noted that any waiver of the federal government's sovereign authority over navigable streams must be surrendered in "*unmistakable terms.*" *Id.* at 707, 107 S.Ct. at 1491 (emphasis added).

Under the facts of this case, 33 U.S.C. § 1371(a) *preserves* the Corps' sovereign immunity in unmistakable terms. Fundamentally, it is impossible for Congress to waive sovereign immunity in the manner argued by North Dakota because doing so would erase the constitutional authority for the construction of the dams in the first place. Navigation under the Commerce Clause provides the essential authority for passage of the FCA. Absent the

navigational component in the FCA, congressional authority to create the main stem reservoir system would have been lacking. Within the scope of the CWA, Congress could not convey to states the authority to force federal dams to cease navigation releases. North Dakota contends that under the CWA, Congress conveyed to individual states the authority to eliminate the interstate commercial aspects of multi-billion dollar projects and eliminate the constitutional footings on which the dams were constructed. Congress recognized this danger and expressly protected navigation in 33 U.S.C. § 1371(a) of the CWA which states: "This chapter shall not be construed as . . . (2) affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation." *Id.*

In considering the language above, the Appeals Court explained: "There are no exceptional circumstances here to indicate that Congress would not have intended the § 1371(a) 'navigation exception' to the waiver of sovereign immunity to apply in this case." *In re Operation of the Missouri River System Litigation, supra*, at 918. Accordingly, the CWA does not allow states to impair navigation on the Missouri River. On this basis alone North Dakota's complaint was properly dismissed.

B. Preemption and Federalism.

North Dakota also asserts that the Appeals Court ruled § 1371(a) preempted its water quality standards undermining "the federalism that makes the Clean Water Act function." Petition at 22. North Dakota misunderstands the Appeals Court ruling as to preemption and the very meaning of "federalism."

The Appeals Court held that the FCA, not § 1371(a), preempts state water quality standards to the extent navigation is negatively impacted. Specifically, the Appeals Court understood that each state in the Missouri River Basin could – and almost certainly would – adopt separate and conflicting CWA standards to achieve desired reservoir management goals. Nebraska, for instance, could establish CWA standards that called for cold water releases from upstream reservoirs to maintain its desired water quality near power plants. Obviously such releases would conflict directly with North Dakota's objectives, and the Corps would again suffer operational paralysis. The Appeals Court recognized this threat observing: "Allowing individual states to use their water-quality standards to control how the Corps balances water-use interests would frustrate the design of the FCA. Accordingly, the enforcement of state water quality standards against the Corps' release of water from Lake Sakakawea is preempted." 418 F.3d at 919. Preemption, therefore, is animated where the conflicting interests of the state parties would prevent the Corps from carrying out its duties under the FCA.

North Dakota's assertions with regard to federalism are baffling. The FCA was written to allow the Corps to operate the main stem dams to provide a wide range of benefits over a multi-state region. North Dakota argues that its individual interests should trump downstream interests in the plan adopted by Congress. It is helpful to note that North Dakota created the interest it now seeks to protect – the non-native fishery in Lake Sakakawea – after the Corps adopted the 1979 Master Manual. The 1979 Master Manual, like its predecessor Master Manuals, identified the scope and magnitude of reservoir releases required to support navigation and downstream uses.

North Dakota knew at the time it chose to create the fishery that fluctuating reservoir levels would, in certain years, result in little cold water fish habitat to protect its introduced species. Furthermore, North Dakota's CWA standards for Lake Sakakawea were only recently adopted solely to protect the non-native species to the detriment of downstream uses, including navigation. North Dakota now argues that it should be allowed to use the CWA to stop the Corps from making water releases necessary to achieve the FCA's multi-state objectives. North Dakota has done this knowing that preventing such releases will interfere with interstate commerce and harm its downstream neighbors. To the extent notions of "federalism" are being undermined, North Dakota should revisit its own parochial interests. It is North Dakota's claim that undermines notions of federalism, not the ruling of the Court of Appeals.

CONCLUSION

North Dakota's Petition is an attempt to seize control of a federal reservoir to promote recreational fishing without regard for the interstate design of the FCA. Congress authorized Lake Sakakawea primarily for flood control and navigation. The interstate commerce implications of navigation serve as the Constitutional platform on which Congress was permitted to authorize the construction of the main stem dams and reservoirs. Allowing North Dakota's CWA standards to undercut that authority is

without precedent or logic. Certiorari should not be granted.

Respectfully submitted,

JON C. BRUNING
Attorney General
DAVID D. COOKSON
Counsel of Record
Assistant Attorney General
State of Nebraska
State Capitol, #2115
Lincoln, Nebraska 68509
(402) 471-2682

DONALD G. BLANKENAU
THOMAS R. WILMOTH
Special Assistant
Attorneys General
FENNEMORE CRAIG, P.C.
206 South 13th Street,
Suite 1400
Lincoln, Nebraska 68508-2019
(402) 323-6200

Attorneys for State of Nebraska

(4)

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In the Supreme Court of the United States

STATE OF NORTH DAKOTA, THROUGH THE NORTH DAKOTA DEPARTMENT OF HEALTH, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
SUE ELLEN WOOLDRIDGE
Assistant Attorney General
JAMES C. KILBOURNE
ROBERT H. OAKLEY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Army Corps of Engineers is immune from enforcement of state-law water quality standards promulgated pursuant to the Clean Water Act, 33 U.S.C. 1313, for the release of water from a Corps-operated reservoir on the Missouri River Main Stem System.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 418 F.3d 915. The memorandum and order of the district court granting the federal defendants' motion to dismiss (Pet. App. 10-20) is reported at 320 F. Supp. 2d 873.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2005. The petition for a writ of certiorari was filed on November 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a series of lawsuits filed by various States and other entities concerning the operation of dams and reservoirs along the Missouri River by the United States Army Corps of Engineers (the Corps). The Judicial Panel on Multidistrict Litigation consolidated those lawsuits for pretrial proceedings. As is relevant here, petitioners, the State of North Dakota and various state agencies and officials, alleged that the Corps violated state-law water quality standards promulgated pursuant to the Clean Water Act, 33 U.S.C. 1313, by releasing water from Lake Sakakawea, one of the reservoirs along the Missouri River. The district court granted the federal defendants' motion to dismiss. Pet. App. 10-20. The court of appeals affirmed. *Id.* at 1-9.[1]

1. Congress enacted the Flood Control Act of 1944 (Flood Control Act or FCA), ch. 665, 58 Stat. 887, to provide for the comprehensive management of the waters of the Missouri River Basin. Along with other legisla-

[1] In a separate decision, the court of appeals rejected the claims of various other parties against the Corps and other federal defendants. North Dakota and South Dakota have filed a petition for a writ of certiorari from that decision, challenging the court of appeals' disposition of the claims of downstream parties under the Flood Control Act of 1944, ch. 665, 58 Stat. 887. See *North Dakota* v. *United States Army Corps of Eng'rs*, petition for cert. pending, No. 05-611 (filed Nov. 14, 2005). In addition, various environmental groups have filed their own petition for a writ of certiorari from that decision, challenging the court of appeals' disposition of their claims under the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, and the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* See *Environmental Defense* v. *United States Army Corps of Eng'rs*, petition for cert. pending, No. 05-631 (filed Nov. 14, 2005). The federal respondents are filing separate briefs in opposition to those petitions for writs of certiorari.

tion, the FCA authorized the Corps to build and operate a series of six dams and associated reservoirs, known as the Main Stem System, along the upstream portion of the river in Montana, North Dakota, South Dakota, and Nebraska; this case concerns the Corps' operation of one of those dams, Garrison Dam, which is located on Lake Sakakawea in North Dakota.[2] The FCA authorizes the Corps to contract for the use of surplus water available at the reservoirs, 33 U.S.C. 708, and to "prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs," provided that "the operation of any such project shall be in accordance with such regulations," 33 U.S.C. 709. The FCA and its legislative history identify various purposes that the Corps is to serve in operating the Main Stem System, including flood control, provision of hydroelectric power, irrigation, recreation, navigation, protection of the water supply and water quality, and preservation of fish and wildlife. See, *e.g.*, *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495, 499-502 (1988).

2. Congress enacted the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). The CWA specifically prohibits "the discharge of any pollutant by any person" except

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[2] The six Main Stem System dams are as follows (with the associated reservoirs identified in parentheses): Garrison Dam (Lake Sakakawea), Oahe Dam (Lake Oahe), Big Bend Dam (Lake Sharpe), Fort Randall Dam (Lake Francis Case), Gavins Point Dam (Lewis and Clark Lake), and Fort Peck Dam (Fort Peck Lake). Congress authorized construction of the Fort Peck Dam in Montana in the earlier River and Harbor Act of 1935, ch. 831, 49 Stat. 1028, for the purpose of flood control and navigation; in 1938, Congress amended that statute to add the purpose of providing hydroelectric power, see Act of May 18, 1938, ch. 250, 52 Stat. 403.

in compliance with prescribed statutory requirements, including permitting requirements. 33 U.S.C. 1311(a). Although the release of dredged or fill material can constitute the "addition of [a] pollutant * * * from [a] point source," and therefore the "discharge of [a] pollutant," for purposes of the CWA, see 33 U.S.C. 1311(a), 1344, 1362(6) and (12), the release of water from a reservoir has consistently been held not to constitute the "discharge of [a] pollutant," and the Corps has therefore not been required to obtain a CWA permit before releasing water from a Corps-operated reservoir. See, *e.g.*, *National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580, 584-588 (6th Cir. 1988); *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 165, 168-169 & nn.39-40, 174-177 (D.C. Cir. 1982).

The Clean Water Act also requires States to promulgate water quality standards, which must be approved by EPA. 33 U.S.C. 1313. Water quality standards are specific to particular bodies of water and consist primarily of (1) the "designated uses" of the bodies involved (*e.g.*, navigation, recreation, or supplying water to the public), and (2) "water quality criteria" based on those designated uses. 33 U.S.C. 1313(c)(2). The CWA provides for the imposition of more stringent restrictions, where necessary, in order to ensure that water quality standards are met. 33 U.S.C. 1311(b)(1)(C); see *Arkansas* v. *Oklahoma*, 503 U.S. 100, 101 (1992).

The Clean Water Act contains a general waiver of federal sovereign immunity, providing that federal agencies "shall be subject to, and comply with, all Federal, State, interstate, and local requirements[] * * * respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity." 33 U.S.C. 1323(a). In language added in

the 1977 amendments to the CWA, the waiver provision states that an enforcement action may be brought in state court and that "[t]his subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law." *Ibid.* A separate section of the CWA, however, specifically provides that the CWA "shall not be construed as * * * affecting or impairing the authority of the Secretary of the Army * * * to maintain navigation." 33 U.S.C. 1371(a).

3. For several years beginning in the late 1990s, the Missouri River Basin experienced prolonged drought conditions, which forced the Corps to make decisions about the allocation of water among competing interests. 05-611 Pet. App. 36. In 2002, North Dakota sought and obtained a preliminary injunction in federal district court under the Flood Control Act requiring the Corps to limit discharges from, and maintain water levels in, Lake Sakakawea. *South Dakota* v. *Ubbelohde*, 330 F.3d 1014, 1019-1022 (8th Cir. 2003), cert. denied, 541 U.S. 987 (2004). In 2003, that injunction was vacated. *Id.* at 1030-1032.

North Dakota also sought to use its CWA water quality standards to prevent the Corps from discharging water from Lake Sakakawea. Under those state standards, Lake Sakakawea's designated use (as a "Class 1 lake") is fishing, and one water quality criterion is that the dissolved oxygen level in the lake must remain above 5 milligrams per liter. N.D. Admin. Code § 33-16-02.1-09(1)(f), (3)(e)(1), and Table 1 (2001). On March 27, 2003, the North Dakota Legislature passed an "emergency" bill amending its water quality statute to authorize the State to seek injunctive relief for the "threat-

ened or continuing violation of a water quality standard" by any person. N.D. Cent. Code § 61-28-06(3) (2003).

4. On April 29, 2003, petitioners filed suit against the Corps and two federal officials in state court, alleging that the Corps' management of Lake Sakakawea would violate North Dakota's water quality standards by reducing the amount of cold-water habitat necessary to support fish populations in the lake. The state court entered a temporary restraining order in which it ordered the Corps to reduce its releases and to "show cause" why further reductions should not be ordered. Pet. App. 77-88. Without addressing 33 U.S.C. 1371(a), the CWA provision specifically applicable to the Corps, the court reasoned that the Corps was subject to suit under 33 U.S.C. 1323(a), the CWA provision generally waiving the federal government's sovereign immunity. Pet. App. 78. The following day, the federal defendants removed the case to the United States District Court for the District of North Dakota. *Id.* at 57. The federal district court dissolved the temporary restraining order, *id.* at 55-76, and then denied petitioners' motion for a preliminary injunction, *id.* at 21-54. As to the latter, the court held that petitioners were unlikely to succeed on the merits because it was "likel[y] that the Corps of Engineers will be able to successfully argue it is immune from suit under [Section 1371(a)]." *Id.* at 54.

5. In the meantime, North Dakota and other parties had filed lawsuits in various district courts, seeking to compel the Corps to alter its operation of the Main Stem System. After the district court denied the motion for a preliminary injunction in this case, the Judicial Panel on Multidistrict Litigation consolidated all of the lawsuits, including this one, for pretrial proceedings before a single court in the District of Minnesota. *In re Operation*

of the Missouri River Sys. Litig., 277 F. Supp. 2d 1378, 1379 (2003). The federal defendants subsequently moved for dismissal of petitioners' complaint in the instant case.

The Minnesota district court granted the motion to dismiss. Pet. App. 10-20. At the outset, the court noted that waivers of sovereign immunity must be strictly construed. *Id.* at 14. The court suggested that it was "possible," if not certain, that Section 1323(a) was applicable to discharges from reservoirs, insofar as the Corps had "jurisdiction" over Lake Sakakawea. *Id.* at 15-16. The court reasoned, however, that, "even if § 1323(a) constituted a waiver of sovereign immunity in this particular case, it would not be a complete waiver of sovereign immunity." *Id.* at 16. The court recognized that Section 1371(a) "provides sovereign immunity for the Corps when compliance with [state] water quality standards might affect or impair the authority of the Corps to maintain navigation." *Ibid.* The court then noted that, under the Flood Control Act, the Corps was required to manage the waters of the Missouri River Basin in such a way as to both control flooding and maintain navigation. *Id.* at 16-17. The court reasoned that "the Corps is faced with an either-or situation: it can either comply with North Dakota's water quality standards and potentially violate its statutory obligation under the FCA to maintain navigation, or it can operate as required under the FCA and potentially violate North Dakota's water quality standards." *Id.* at 17. "Although it is possible that the Corps may be able to simultaneously meet both its obligations," the court concluded, "the Court simply cannot require the Corps to always do both." *Ibid.* The court added that principles of preemption supported its conclusion, because "[r]equiring that the Corps always

comply with North Dakota's state water quality laws in its operation of the Missouri River impairs the Corps' ability to maintain navigation, and its ability to comply with the FCA." *Id.* at 19.

6. The court of appeals affirmed. Pet. App. 1-9. Like the district court, the court of appeals first noted that waivers of sovereign immunity must be strictly construed. *Id.* at 4. The court reasoned that, "[o]n its face, § 1371(a) exempts the Corps[] * * * from complying with the CWA when its authority to maintain navigation would be affected." *Id.* at 5. "It is also clear from the face of North Dakota's complaint," the court continued, "that North Dakota is attempting to use its state water-quality standards to affect the Corps' authority to release water from Lake Sakakawea to support navigation." *Ibid.* The court concluded that "[t]here are no exceptional circumstances here to indicate that Congress would not have intended the § 1371(a) 'navigation exception' to the waiver of sovereign immunity to apply in this case." *Ibid.*

The court of appeals then rejected petitioners' contention that the language or legislative history of the 1977 amendments to the CWA altered its analysis. Pet. App. 6. The court reasoned that the 1977 amendments, "while emphasizing that the limited waiver of sovereign immunity in § 1323(a) applied to the Corps, left the clearly worded navigation exception in § 1371(a) intact." *Ibid.* The court noted that, "[i]n any event," "[t]he legislative history indicates that Congress' intent in enacting the 1977 amendments was to subject the Corps' *channel-dredging* activities to state water-quality standards promulgated pursuant to the CWA, while preserving its authority to maintain navigation." *Id.* at 6 n.4. In light of its interpretation of Section 1323(a), the court did not

reach the issue whether Section 1323(a) was even applicable to releases of water from reservoirs. *Id.* at 5 n.3.

The court of appeals also rejected petitioners' contention that whether compliance with North Dakota's water quality standards would affect the Corps' authority to maintain navigation was a factual question. Pet. App. 7. The court reasoned that, "[i]f each state is allowed to use its reservoir water-quality standards as a tool to control how the Corps must release water from the main stem reservoirs, the 'authority of the Secretary of the Army . . . to maintain navigation' will obviously be affected." *Id.* at 8 (quoting 33 U.S.C. 1371(a)). Finally, the court of appeals, like the district court, noted that "the above result is also supported by the principles of preemption," *ibid.*, because "[a]llowing individual states to use their water-quality standards to control how the Corps balances water-use interests would frustrate the design of the FCA," *id.* at 9.

ARGUMENT

Petitioners contend (Pet. 16-30) that the court of appeals erred by holding that the Corps of Engineers is immune from enforcement of state-law water quality standards promulgated in accordance with the Clean Water Act for the release of water from a Corps-operated reservoir on the Missouri River Main Stem System. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

1. Petitioners do not contend that the decision below conflicts with any decision of another court of appeals. Instead, petitioners contend (Pet. 29) only that the holding of the court of appeals is "inconsistent with the man-

date of this Court" in *PUD No. 1 of Jefferson County* v. *Washington Department of Ecology*, 511 U.S. 700 (1994). As petitioners correctly note (Pet. 29), in *PUD No. 1*, the Court rejected the proposition that the CWA "is only concerned with water 'quality,' and does not allow the regulation of water 'quantity.'" 511 U.S. at 719. The Court ultimately held that a State possessed the authority under Section 401 of the CWA, 33 U.S.C. 1341, to impose minimum stream flow requirements as a means of enforcing its water quality standards. 511 U.S. at 723. In *PUD No. 1*, however, the Court considered only the substantive scope of Section 401 of the CWA. It did not address any issue relating to the immunity of federal agencies under the CWA generally, much less the immunity of the Corps concerning discharges from Corps-operated reservoirs more specifically, and it likewise did not resolve any questions in that case concerning possible conflicts between state standards and federal licensing decisions. See *id.* at 722. Because *PUD No. 1* is inapposite, petitioners identify no conflict that warrants this Court's review.[4]

2. In any event, the court of appeals correctly held that the Corps is immune from enforcement of state-law water quality standards for the release of water from Lake Sakakawea. The CWA contains a general waiver

[4] For much the same reason, it is unnecessary for the Court to hold this petition pending its disposition of *S.D. Warren Co.* v. *Maine Department of Environmental Protection*, cert. granted, No. 04-1527 (Oct. 11, 2005). That case presents the question whether the release of water from a dam constitutes a "discharge" for purposes of the state certification requirement of Section 401(a)(1) of the CWA, 33 U.S.C. 1341(a)(1). Like *PUD No. 1*, *S.D. Warren Co.* concerns only the substantive scope of Section 401 of the CWA, not the application of state standards in other contexts or the immunity of a federal agency from enforcement of such standards.

of sovereign immunity, providing that federal agencies "shall be subject to, and comply with, all Federal, State, interstate, and local requirements[] * * * respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity," and it provides for enforcement of those requirements in court. 33 U.S.C. 1323(a). The CWA, however, also specifically provides that the statute "shall not be construed as * * * affecting or impairing the authority of the Secretary of the Army * * * to maintain navigation." 33 U.S.C. 1371(a). The most natural reading of those provisions is that Section 1371(a) provides an exception to the general waiver of sovereign immunity in Section 1323(a) where compliance with state-law water quality standards would interfere with the Corps' statutory obligation to maintain navigation. As both of the lower courts noted (Pet. App. 4, 14), that reading is consistent with the oft-cited principle that "a waiver of sovereign immunity must be strictly construed in favor of the sovereign." *Orff* v. *United States*, 125 S. Ct. 2606, 2610 (2005); see, *e.g.*, *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992).

In this case, although petitioners contended (see Pet. App. 7-8) that the Corps could have fulfilled its statutory obligation to maintain navigation through other means (*e.g.*, by constructing new outflow structures to ensure that only warmer water was released from Lake Sakakawea), and although petitioners note (Pet. 22) that their complaint "contains no reference to, and no request for, any relief relating to navigation," it is indisputable that the Corps acted primarily, if not exclusively, for the purpose of maintaining downstream navigation in ordering discharges from Lake Sakakawea.

See, *e.g.*, *Ubbelohde*, 330 F.3d at 1020-1022. Moreover, the court of appeals expressly rejected North Dakota's argument that the Corps could have fulfilled its statutory obligation to maintain navigation through other means on the ground that, "[i]f each state is allowed to use its reservoir water-quality standards as a tool to control how the Corps must release water from the main stem reservoirs, the 'authority of the Secretary of the Army . . . to maintain navigation' will obviously be affected." Pet. App. 8. Because the court of appeals correctly concluded that application of state water quality standards to prevent the Corps' discharges from Lake Sakakawea would necessarily "affect[]" or "impair[]" the Corps' authority to maintain navigation, the court of appeals also correctly concluded that state enforcement of those standards was barred.

Petitioners contend (Pet. 27-29) that the 1977 amendments to the CWA alter the analysis. Those amendments added language to Section 1323(a) specifying that "[t]his subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law." Petitioners argue that the additional language constituted a plenary waiver of the Corps' immunity under the CWA—and, therefore, that the additional language effectively repealed Section 1371(a) in its entirety. Petitioners' argument, however, violates "the cardinal rule . . . that repeals by implication are not favored." *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 132 (2003) (citation omitted). Petitioners fail to supply "the overwhelming evidence needed to establish repeal by implication." *J.E.M. AG Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 137 (2001).

To the contrary, the legislative history indicates that Congress did *not* intend to repeal Section 1371(a) when it amended Section 1323(a) in 1977. As the court of appeals noted (Pet. App. 6 n.4), the legislative history of the 1977 amendments makes clear that Congress's intent was merely to subject the Corps to state water quality standards when it engages in the discharge of dredged or fill material—not to subject the Corps to state authority more generally (or specifically when it is releasing water from a reservoir to maintain navigation). Moreover, in adding a separate statutory provision expressly subjecting the discharge of dredged or fill material to state water quality standards, Congress included language specifying that "[t]his section shall not be construed as affecting or impairing the authority of the Secretary [of the Army] to maintain navigation." 33 U.S.C. 1344(t). Because that language tracks the language of Section 1371(a), the incongruous result of petitioners' construction would be that Congress provided the Corps with some immunity from enforcement when it engages in the discharge of dredged or fill material, at the same time that Congress entirely abrogated the Corps' immunity from enforcement when it engages in other types of activity. Because there is no indication that Congress intended that peculiar result, the text and background of the relevant provisions of the CWA confirm that Congress left Section 1371(a) intact when it enacted the 1977 amendments.

3. Finally, the question presented is not an important or recurring one that warrants this Court's review. Petitioners not only fail to establish even an arguable conflict between the court of appeals' decision and any decision of this Court or another court of appeals; they also fail to cite a single case in which a State has at-

tempted to enforce its water quality standards against the Corps in similar circumstances, much less any case in which the Corps has invoked Section 1371(a) in response. Moreover, the court of appeals made clear that, where an action against the Corps does not affect the Corps' authority to maintain navigation, the Corps would be subject to the general waiver of sovereign immunity in Section 1323(a). Pet. App. 6. Petitioners thus provide no reason to believe that the court of appeals' decision interpreting Section 1371(a) will have significant implications beyond the instant case.[4]

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[4] In circumstances where the Corps or another federal agency is subject to the general provisions of Section 1323(a), a further question may arise in a given case as to whether a particular state water quality standard, including the designation of use for the particular water body, would be preempted by another federal statute or the responsibilities of an agency under such a statute. See, *e.g.*, *PUD No. 1*, 511 U.S. at 722. The court of appeals did not reach or decide any such question under Section 1323(a), however. To the extent that the court of appeals discussed preemption principles, it did so to reinforce its interpretation of Section 1371(a) as independently barring this suit. Although we agree with the court of appeals that enforcement of various States' standards could significantly interfere with the Corps' ability to manage water releases in the Main Stem System (and therefore to accomplish the purposes of the Flood Control Act), that discussion was not essential to the holding of this case. See, *e.g.*, Pet. App. 8 (noting that "the above result is also supported by the principles of preemption"). It is a long-established principle that this Court "reviews judgments, not opinions." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

JAMES C. KILBOURNE
ROBERT H. OAKLEY
Attorneys

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Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF OF THE STATE OF NORTH DAKOTA IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

State of North Dakota
WAYNE STENEHJEM
Attorney General

LYLE G. WITHAM
Assistant Attorney General
State Bar ID No. 04118
Counsel of Record
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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1. Question presented. The federal respondents paraphrase North Dakota's statement of the question presented, but substitute the verb phrase "is immune" for the verb "exempts" used by the Eighth Circuit, and attempt to expand the "question presented" from the water quality standards (ND Pet. 2-4) that North Dakota promulgated under CWA § 303 (33 U.S.C. § 1313), to a more general question of the Corps' immunity from all "state-law water quality standards promulgated" under § 303 as applied to any "Corps-operated reservoir on the Missouri River." Respondent Nebraska objects to North Dakota's statement of the question presented as one that was not passed on below, suggesting that the issue North Dakota raises is "whether the Corps was universally 'exempt' from CWA compliance." (Neb. Op. Br. 1) They misconstrue the "question presented" for the reasons discussed below.

33 U.S.C. § 1371(a) (CWA § 511(a)) provides:

> This chapter [the CWA] shall not be construed as . . . (2) affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation or (B) under the Act of March 3, 1899 . . . (ND App. 105)

The court below interprets this language as follows:

> On its face, § 1371(a) exempts the Corps, which operates under the authority of the Secretary of the Army, from complying with the CWA when its authority to maintain navigation would be affected. (ND App. 5)

But it is not obvious on its face that complying with North Dakota's § 303 water quality standards interferes with the Corps' "authority" to maintain navigation. It is possible to both maintain navigation and comply with state water quality standards, just as it is possible to drive a car and comply with the speed limit. A speed limit does not affect or impair a licensed driver's "authority" to drive: that authority can be exercised within the constraints of

the law. A state § 303 water quality standard, likewise, does not affect or impair the "authority" of the Secretary of the Army "to maintain navigation": that authority can be exercised within the constraints of the law. § 1371(a) neither "exempts" the Corps from North Dakota's water quality standards, nor do those standards affect or impair the "authority" of the Secretary "to maintain navigation": the Corps' "authority" to maintain navigation may be exercised within the context of North Dakota's § 303 standards as well as other "Federal, State, interstate and local" water pollution "requirements"[1] that may apply under § 1323(a) and other relevant federal laws such as the Flood Control Act (FCA) and the Endangered Species Act (ESA).

So North Dakota's petition accurately states the legal issue that arises out of § 1371(a), the court of appeal's interpretation of that text, and the standard of review: "Whether the court below erred in holding as a matter of law that the Clean Water Act exempts the Corps of Engineers from complying with water quality standards North Dakota is required to enact under § 303(c) of the Act?" (ND Pet. ii) Other aspects of the opinion below illustrate why this is the appropriate issue, and why the brief of the federal respondents (Fed. Op. Br. 10-13) misconstrues §§ 1371(a) and 1323(a).

After concluding that "the authority" of the Secretary of the Army "to maintain navigation" under § 1371(a) is a trump card that "exempts" the Corps' from complying with the CWA when the "authority" of the Corps "to maintain navigation . . . would be affected," the next sentence of the opinion states: "It is also clear from the face of North Dakota's complaint that North Dakota is attempting to use its state water-quality standards to affect the Corps'

[1] CWA § 313(a), 33 U.S.C. § 1323(a), ND App. 101-103.

authority to release water from Lake Sakakawea to support navigation." (ND App. 5) The court below appears to make this claim to satisfy the standard of review that, as a matter of law, applies in this case: "we must accept the allegations of the complaint as true and dismiss the case only when 'it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief.'"[2] But North Dakota's Complaint does not mention navigation nor does it ask for any relief relating to navigation (ND App. 123-140, ND Pet. 13-14), and there are many sets of facts in support of North Dakota's claims that would entitle it to relief. (ND Pet. 9-16, 21-23) So it is not true that North Dakota's complaint affected the Corps' authority. Making "the authority" of the Corps "to maintain navigation" a trump card that "exempts" the Corps from complying with the CWA in effect changed the legal standard of review that the court below applied. Rather than accepting the allegations of North Dakota's complaint as true, and determining whether it appears "beyond doubt" that North Dakota can prove no set of facts in support of its claim, the court below made navigation trump North Dakota's § 303 standards under any hypothetical set of facts that impacts navigation.

The Court below, in fact, based its ruling on such a hypothetical: "If each state is allowed to use its reservoir water-quality standards as a tool to control how the Corps must release water from the main stem reservoirs, the 'authority of the Secretary of the Army . . . to maintain navigation' will obviously be affected, in violation of § 1371(a)." (ND App. at 8) North Dakota's § 303 standards (N.D. Admin. Code chapter 33-16-02.1), for example, are based on a "known and reasonable methods to control and

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[2] ND App. 4, quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

prevent pollution" policy.[3] And in enforcing the State's declared policy "to protect, maintain, and improve the quality of the waters in the state,"[4] N.D.C.C. § 61-28-01 requires the health department "to cooperate with . . . agencies of other states, and the federal government in carrying out these objectives." Thus, the narrative standards that North Dakota asserts are not absolute standards that trump water quality standards in other states, nor do they trump the other federal statutes such as the FCA and the ESA that also apply to the Corps' management of the river. Rather these standards require, at most, a "greatest extent practicable" compliance level (ND App. 86) as applied by the state district court in this case, and even that compliance level is subject to the requirement that the enforcing agency "cooperate" with "agencies of other states, and the federal government" in carrying out the objectives of North Dakota's water pollution laws.[5]

North Dakota's water quality standards are just one among the many sets of federal, state, and local laws that the Corps must consider and comply with in its management of the main stem reservoirs on the Missouri River. They bring to bear the state's particular knowledge of the local water quality conditions as well as other local circumstances that bear upon managing the shared resource that is the Missouri River. They require application only of "known and reasonable methods"[6] to control water pollution, and these standards do not trump or override other water pollution laws up and down the river. North Dakota has never asserted that they do. Potential conflicts between laws is a policy consideration that Congress

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[3] N.D. Admin. Code § 33-16-02.1-02(2).

[4] N.D.C.C. § 61-28-01.

[5] N.D.C.C. § 61-28-01.

[6] N.D. Admin. Code § 33-16-02.1-02(2).

addressed. It determined that federal facilities and properties should comply with "all Federal, State, interstate, and local requirements . . . respecting the control and abatement of water pollution."[7]

The opinion below rests upon an assertion that the waiver for federal facilities and property of federal immunity in § 313 (33 U.S.C. § 1323) was "limited." (ND App. 4) This waiver is "limited" only in the sense that it is limited to "Federal, State, interstate, and local requirements . . . respecting the control and abatement of water pollution."[8] But the waiver itself was not a "limited" waiver by the plain language of its text: the word "all" was added to make clear that the waiver included "all Federal, State, interstate, and local requirements . . . respecting the control and abatement of water pollution."[9] (*Compare* 1976 version to current version – ND App. 100 to ND App. 101) And Congress added the following unequivocal waiver of immunity to § 313 in 1977 in response to *Minnesota v. Hoffman*, 543 F.2d 1198 (8th Cir. 1976) (in which Minnesota attempted to enforce its water quality standards against the Corps):

> This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.[10]

This case cries out for a textualist approach. The federal courts below discussed § 313 (§ 1323), but ignored the above-mentioned unequivocal waiver of immunity in the text. Instead, each referred to portions of the legislative

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[7] CWA § 313(a), 33 U.S.C. § 1323(a), ND App. 101.

[8] CWA § 313(a), 33 U.S.C. § 1323(a), ND App. 101.

[9] CWA § 313(a), 33 U.S.C. § 1323(a), ND App. 101.

[10] CWA § 313(a), 33 U.S.C. § 1323(a), ND App. 101. *Compare* ND App. 100 to ND App. 101. *See also* ND App. 120.

history that discussed *Hoffman* and the Corps' dredge-and-fill activities in that case. (ND App. 4-5 & n.4, 15, and 30-35) The state district court looked at the same legislative history and drew a different conclusion. (ND App. 80)[11] But the actual words added to § 313 did not limit the waiver of federal immunity in § 313 to the Corps' dredge-and-fill responsibilities, or even mention them: rather the waiver unambiguously covered "all Federal, State, interstate, and local requirements . . . respecting the control and abatement of water pollution" and stated unequivocally that "[t]his subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law."[12]

Finally, the court below stated "[t]here is nothing ambiguous about the admonition" of § 1371(a)(2)(A) "that the CWA shall not be construed as . . . affecting or impairing the authority of the Secretary of the Army . . . to maintain navigation." (ND App. 6, 105) By the same reasoning, there should be nothing ambiguous about the admonition of § 1371(a)(2)(B) that the CWA "shall not be construed as . . . affecting or impairing the authority of the Secretary of the Army . . . under the Act of March 3, 1899." The "Act of March 3, 1899" refers to the Corps' dredge-and-fill authority under the CWA. (ND Pet. 26, ND App. 105 and 107) Yet the court below says that the language of § 1371(a)(2)(A) "exempts" the Corps from the waiver of immunity in § 313 (§ 1323(a)) by leaving "the clearly

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[11] The use of legislative history by all parties and the courts in this case illustrates the metaphor that using legislative history often becomes "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia concurring).

[12] CWA § 313(a), 33 U.S.C. § 1323(a), ND App. at 101. *Compare* ND App. 100 to ND App. 101. *See also* ND App. 120.

worded navigation exception in § 1371(a) intact" (ND App. 6), but holds that the reference in § 1371(a)(2)(B) to "the Corps channel dredging operations" (ND App. 6 and n.4) – which was also "left intact" – is no longer effective, based, apparently, on the legislative history cited in footnote 4.[13] This is inconsistent and untenable. (ND Pet. 25-27)

In sum, the question presented is one of statutory construction (ND Pet. 20) that requires the Court to look to the particular statutory language at issue – the provisions of §§ 303, 313, and 511 – in the context of the language and design of the Act as a whole.[14] The issue is not a general question of immunity for the Corps from all "state-law water quality standards promulgated" under § 303 as applied to any "Corps-operated reservoir on the Missouri River" as suggested by the Corps. (Fed. Op. Br. I) Nor is the issue "whether the Corps was universally 'exempt' from CWA compliance." (Neb. Op. Br. 1) Instead, for the reasons discussed above, North Dakota accurately describes the issue arising out of the decision of the court below: "Whether the court below erred in holding as a matter of law that the Clean Water Act exempts the Corps of Engineers from complying with water quality standards North Dakota is required to enact under § 303(c) of the Act?" (ND Pet. ii)

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[13] The last sentence of the legislative history in n.4 of the opinion, ND App. 7, which the Court below apparently found conclusive, refers to the amendments to CWA § 404 (33 U.S.C. § 1344), not to the amendments to CWA § 313 (§ 1323) at issue here. *Compare* to the state district court's reference to the same legislative history reaching the opposite result. (ND App. 80) *See also* footnote 11, *supra*, in response to § 1344(t) comments at Fed. Op. Br. 13.

[14] *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.").

2. Sup. Ct. R. 10(c) and federalism. The federal respondents suggest this case is not important (Fed. Op. Br. 10-13) and criticize our petition because it does not show a conflict between the circuits. (Fed. Op. Br. 9) But the Eighth Circuit and the North Dakota federal district court cited similar cases that those courts attempted to distinguish on the grounds that those cases didn't involve "navigation."[15] And this Court is currently considering closely related issues involving dam-caused pollution by non-federal dams (*see* SD et al. Amici Br. 18) and the scope of the Corps' authority over navigable waters (*see* SD et al. Amici Br. 4-5, n.7).

This case raises a related important question of federal law that has not been, but should be, settled by this court: the enforceability of § 303 state water quality standards against Corps controlled dams. (ND Pet. 16-25; SD et al. Amici Br. 1-20) The Clean Water Act is grounded in a cooperative federalism that "anticipates a partnership between the States and the Federal Government, animated by a shared objective" of protecting the nation's waters.[16] The role of the states is to prevent, reduce, and eliminate pollution under their inherent police powers. (ND Pet. 23-25) "By guaranteeing state and local governments broad decision-making authority, federalist principles secure decisions that rest on knowledge of local

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[15] ND App. 5-6, n.3 (citing and discussing *Nat'l Wildlife Fed'n v. Corps of Engineers*, 384 F.3d 1163 (9th Cir. 2004)); ND App. 35-42 & nn.5-6 (citing and discussing *Nat'l Wildlife Fed'n v. Corps of Engineers*, 132 F. Supp. 2d 876 (D.Or. 2001); *Nat'l Wildlife Fed'n v. Corps of Engineers*, 92 F. Supp. 2d 1072 (D.Or. 2000); and *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 182-83 (D.C. Cir. 1982) (noting that state water quality standards would have been the better way to deal with the Corps-controlled "dam caused pollution" in that case, and noting that new dams cannot be built unless they comply with state water quality standards)).

[16] *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

circumstances, help to develop a sense of shared purposes and commitments among local citizens, and ultimately facilitate 'novel social and economic experiments.'"[17] "[A]gainst the backdrop of a highly complex set of social problems that defy decision purely at local or purely at federal levels"[18] such as those created by the Missouri River dams, it is critical to preserve the federalist framework of the Clean Water Act that gives states a meaningful role. That is the underlying issue in this case. This court should not decline to consider this issue merely because other states are not facing a similar environmental problem caused by the Corps that threatens the designated beneficial use of the most important water body in their state. (ND Pet. 7-16)

3. ***PUD No. 1.*** *PUD No. 1* involved narrative water quality standards nearly identical to those involved here: Washington designated the beneficial use of the stream as a "Class AA water" capable of supporting "'[s]almonid . . . migration, rearing, spawning, and harvesting.'"[19] Here, the designated use for Lake Sakakawea is a "Class 1" water "capable of supporting growth of Salmonid fishes and associated aquatic biota."[20] In *PUD No. 1*, this Court held that such narrative criteria are enforceable by states and that the dam in that case had to be operated consistently with this designated use.[21] The federal respondents attempt to distinguish this case from *PUD No. 1* as discussed in our petition (ND Pet. 29-30) on the grounds that

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[17] Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 57 (Knopf 2005) (quoting *Gonzales v. Raich*, 125 S.Ct. 2195, 2220 (2005)).

[18] *Id.* at 57.

[19] 511 U.S. 700, 714 (1994).

[20] N.D. Admin. Code § 33-16-02.1-09(1)(f). (ND App. 108-109, 119)

[21] 511 U.S. at 713-20. *See also* ND App. 43-44.

this isn't a CWA § 401 case. (Fed. Op. Br. 10) This should be rejected for the reasons discussed by the *amici* states in support of the petition. (SD et al. Amici Br. 11-12 and 17-18) When Congress amended CWA § 313 (§ 1323) in 1977, it coupled that strengthened waiver of federal immunity with repeal of the exemption of federal agencies from § 401 certification requirements for dams that had previously existed for federal agencies under § 401(a)(6),[22] and added the requirement that dams regulated under § 401 must comply with § "303"[23] – the § 303 water quality standards that states must establish for all navigable waters within their boundaries. (§ 1313(c) ND App. 91-92) N.D. Admin. Code chapter 33-16-02.1 consists of the water quality standards that North Dakota established under § 303 for its navigable waters, including Lake Sakakawea, that it seeks to enforce against the Corps.

Respectfully submitted,

State of North Dakota
WAYNE STENEHJEM
Attorney General

LYLE G. WITHAM
Counsel of Record
Assistant Attorney General
State Bar ID No. 04118
Office of the Attorney General
500 North 9th Street
Bismarck, ND 58510-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300

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[22] ND App. 121, quoting Sec. 61(b) of Pub. L. No. 95-217, 95th Cong., 1st Sess., and SD et al. Amici App. at 12, showing language of § 401(a)(6) repealed by Sec. 61(b).

[23] ND App. 122, quoting Sec. 64 of Pub. L. No. 95-217, 95th Cong., 1st Sess.

No. 05-628

In The
Supreme Court of the United States

STATE OF NORTH DAKOTA, THROUGH THE NORTH DAKOTA DEPARTMENT OF HEALTH, AN AGENCY OF THE STATE OF NORTH DAKOTA; JOHN HOEVEN, GOVERNOR; WAYNE STENEHJEM, NORTH DAKOTA ATTORNEY GENERAL, EX REL. STATE OF NORTH DAKOTA; NORTH DAKOTA DEPARTMENT OF HEALTH,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, A FEDERAL AGENCY; GREGG F. MARTIN, DIVISION COMMANDER, NW DIVISION, PORTLAND, OREGON, UNITED STATES ARMY CORPS OF ENGINEERS; JEFFREY BEDEY, COLONEL, DISTRICT ENGINEER, OMAHA DISTRICT, STATE OF NEBRASKA, STATE OF MISSOURI, STATE OF SOUTH DAKOTA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICUS CURIAE* NEBRASKA PUBLIC POWER DISTRICT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DONALD G. BLANKENAU
THOMAS R. WILMOTH
Counsel of Record
FENNEMORE CRAIG, P.C.
206 South 13th Street, Suite 1400
Lincoln, NE 68508
(402) 323-6200
Attorneys for the Nebraska Public Power District

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICUS CURIAE*

The Nebraska Public Power District ("NPPD") is a political subdivision of the State of Nebraska organized and existing under the laws Nebraska.[1] NPPD owns and operates Cooper Nuclear Station ("CNS"), the largest single unit power generating station in Nebraska. The CNS facility is located downstream of Nebraska City, Nebraska on the banks of the Missouri River. The facility depends on Missouri River water for cooling purposes and to insure compliance with thermal discharge limitations imposed under a National Pollutant Discharge Elimination System ("NPDES") permit associated with the facility.[2] NPPD purchases electricity from the Western Area Power Administration ("WAPA"), an agency of the federal government that markets electricity generated at the six hydroelectric power plants on the main stem of the Missouri River. NPPD is one of WAPA's largest customers, consistently among the top ten purchasers of firm energy and traditionally the largest purchaser of firm energy from the Pick-Sloan Project. The United States Army Corps of Engineers' ("Corps") operation of the main stem reservoirs on the Missouri River directly affects NPPD's operation of CNS and the supply of low-cost hydropower available for NPPD's acquisition and provision to its customers.

In the proceedings below, North Dakota sought to limit releases by the Corps from Gavins Point Dam to

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[1] *See* NEB. REV. STAT. § 70-602 (Reissue 2002). As such, NPPD is not required to obtain consent for the filing of this *amicus* brief pursuant to Rule 37.4.

[2] A NPDES permit issued under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, authorizes discharges of pollutants, including thermal discharges, into the waters of the United States. 33 U.S.C. § 1342.

approximately 21,000 cubic feet per second ("cfs") and use the conserved water to preserve cold water habitat in Lake Sakakawea. The Nebraska Power Association ("NPA") has analyzed the potential impacts to Nebraska power supplies from a sustained reduction in summer flows to 21,000 cfs. NEBRASKA POWER ASSOCIATION, IMPACTS OF POSSIBLE CHANGES IN MISSOURI RIVER FLOWS ON NEBRASKA'S ELECTRIC ENERGY INDUSTRY (Dec. 2003) ("NPA Report"). The NPA Report estimated direct impacts to CNS from such low summer flows to be $7,000,000 annually. *Id.* at 13. The NPA Report also discusses the impact of reduced flows on the availability of low cost hydropower generated by the Corps and marketed by WAPA to NPPD and other utilities, concluding Nebraskans could see an increase in energy costs of $6,600,000 annually. *Id.* at 15. The NPA Report estimated the impact of long-term (i.e., full summer) reduced flows on the entire region at nearly $1 billion. *Id.* at 22. The NPA's conclusion that low summer flows compromise both water supply and hydropower benefits is supported by the Corps' analysis in the Final Environmental Impact Statement for Missouri River Master Water Control Manual (2004) ("FEIS"). *E.g.*, FEIS §§ 5.9, 5.10.

SUMMARY OF ARGUMENT

NPPD files this brief to: 1) Provide the Court with a broader view of the economies supported by the Corps' Missouri River reservoir operations, and 2) explain how the relief sought by North Dakota in this case would negatively impact those economies. North Dakota incorrectly presents this case as pitting upstream recreation against downstream navigation. Much more is at stake

here. Significant infrastructure has built up around and is dependant upon the minimum flows required to support navigation. The benefits of ongoing Missouri River operations exceed $1 billion annually. Many of these benefits are supported by the Corps' maintenance of the minimum navigation flows North Dakota would curtail if allowed to enforce its state water quality standards under the circumstances presented to the courts below.

ARGUMENT

I. NORTH DAKOTA'S DEPICTION OF ECONOMIES IN THE MISSOURI RIVER BASIN IS INCOMPLETE.

Contrary to North Dakota's portrayal, the Missouri River reservoir system provides multiple benefits to states throughout the Missouri River Basin. These benefits would be negatively impacted by enforcement of North Dakota's water quality standards. Many of these benefits, not discussed in North Dakota's petition, depend on navigation flows for consistent and reliable quantities of water. While navigation may not be the most economically prosperous use in the Basin,[3] navigation flows support other downstream uses resulting in myriad benefits to the

[3] The Eighth Circuit Court of Appeals properly recognized that the relative economic benefit provided by navigation to the Basin is irrelevant. *See In re Operation of the Missouri River System Litigation*, 421 F.3d 618, 629-30 (8th Cir. 2005) ("Nothing in the text or legislative history of the [Flood Control Act] suggests that Congress intended the priority of interests under the [Flood Control Act] to shift according to their relative economic value. Arguments based on the wisdom of the priorities established . . . must be addressed to Congress.").

Basin States. Thus, this case is not merely about upstream recreation versus downstream navigation.

For example, the National Academy of Science ("NAS") concluded the benefits of ongoing Missouri River operations exceed $1 billion annually. *See generally* NATIONAL ACADEMY PRESS, THE MISSOURI RIVER ECOSYSTEM: EXPLORING THE PROSPECTS FOR RECOVERY (2002) ("NAS Report"), ch. 4. The primary benefits are from hydropower, municipal water supplies, and flood damage reduction, "each of which has annual benefits measured in hundreds of millions of dollars." NAS Report at 89. The water supply benefits from Missouri River operations "accrue at intakes for thermal power plants and at municipal, irrigation, commercial/industrial, domestic, and public water intakes so long as daily flows exceed minimum elevation requirements for water intakes." *Id.* at 90. The MISSOURI RIVER MASTER WATER CONTROL MANUAL (2004) ("Master Manual") explains that more than 1,600 intakes and intake facilities have been identified on the main stem of the Missouri River. Master Manual VII-46, § 7-11.2. According to the Corps:

> These intakes are primarily for municipal, industrial, and individual water supplies, fossil and nuclear-fueled powerplant cooling, and irrigation withdrawals directly from the Missouri River. . . . The lower river reach is very reliant on the river for water supply because 94 percent of the population served . . . is located downstream of the [dam and reservoir] System. In addition, 75 percent of the generation by thermal powerplants using the Missouri River, . . . is located below the System.

North Dako[illegible]ttempts to trivialize the countervailing interests at stake by focusing solely on the navigation industry and disregarding entirely the other benefits supported by the Corps' navigation-based operations. However, when viewed more broadly, the value of the downstream benefits dwarfs that of upstream recreation. North Dakota's explanation of its recreational interest itself is misleading. North Dakota implies the value of recreation in North Dakota is $84.7 million annually. Petition at 15. However, not all of these benefits are derived from upstream reservoir use, let alone solely from Lake Sakakawea. In fact, all the reservoirs in North Dakota only account for 26%, or $22 million, of the recreation benefits on the system. NAS Report at 95.

The downstream benefits of Corps operations are supported in large part by the Corps' maintenance of minimum navigation flows. The Corps has determined, based on over 100 years of hydrologic data and 60 years of operations, that, *at a minimum*, releases of 25,000 cfs are required from Gavins Point Dam to support navigation. Master Manual (2004) at VII-10. To ensure adequate water remained in Lake Sakakawea in 2003, North Dakota sought to limit releases by the Corps from Gavins Point Dam to approximately 21,000 cfs and use the conserved water to preserve cold water habitat in the lake. *See* Appellant's Appendix (filed before the Court of Appeals) at 782 (Affidavit of Todd S. Sando, North Dakota Assistant State Engineer ¶ 43) (noting releases from Gavins Point must be reduced to 21,000 cfs to establish "a minimum volume of cold water fish habitat" in Lake Sakakawea). North Dakota acknowledged that navigation could not be supported under such conditions. *See id.* at

782-83 (Affidavit of Todd S. Sando ¶¶ 43-45). As the Corps' Chief of Missouri River Basin Water Management explained: "Failure to meet minimum service flow targets would end commercial navigation on at least a portion of the river." *Id.* at 1507 (Declaration of Lawrence J. Cieslik ¶ 16). The Corps also explained that other project purposes would be negatively impacted by flow reductions below minimum navigation service levels. *Id.* at 1509-11 (Declaration of Lawrence J. Cieslik ¶¶ 22-29).

NPPD is particularly concerned about the potential impact enforcement of North Dakota's water quality standards would have on hydropower generation and the ability of powerplants downstream of Gavins Point Dam to operate at capacity.

II. THE AVAILABILITY OF HYDROPOWER WOULD BE ADVERSELY IMPACTED BY THE RELIEF SOUGHT BY NORTH DAKOTA.

The Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944) ("FCA"), requires the Corps to produce hydropower from the main stem dams to provide affordable electric power over a multi-state region and to offset the enormous cost of dam construction. Section 5 of the FCA states:

> Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to *encourage the most widespread use thereof at the lowest possible rates*

> *to consumers* consistent with sound business principles. . . .

(Emphasis supplied). *See also* S. DOC. NO. 247, 78th Cong., 2d Sess. (1944) at 1, 3-4; S. DOC. NO. 191, 78th Cong., 2d Sess. (1944) at 12 ("The low-cost power to be developed should be given the widest possible distribution for the benefit of the whole region.") The Corps' Master Manual explains that "[h]ydropower is the only Congressionally authorized purpose of the System that actually returns money to the Federal Treasury." Master Manual VII-48, § 7-12. "Realization of the maximum power potential provided by the water passing through the dams of the System requires that hydropower operations be carefully integrated into regulation of the overall System. . . . Regulation of the System projects is scheduled to develop the maximum power benefits to the extent reasonably possible." *Id.*

The six main stem dams support 36 hydropower units with a combined capacity of 2,435 megawatts ("MW"). Hydropower generated at these dams provides "dependable capacity to meet annual peak power demands" thereby firming reliability in the Mid-continent Area Power Pool ("MAPP"). FEIS 3-119.[4] Hydropower has favorable operating characteristics such as efficient peaking, rapid rate of unit unloading and rapid power availability in the event of emergencies. *Id.* Hydropower also reduces the overall cost of electricity. *Id.*

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[4] The hydropower system on the Missouri River provides about 9% of the energy used in the MAPP region, which includes all of Iowa, Minnesota, Nebraska, and North Dakota, most of South Dakota, and portions of Illinois, Montana, and Wisconsin. *See* FEIS at 3-119.

Power generated from hydroelectric facilities on the Missouri River is marketed primarily to public power and rural cooperative utilities in the MAPP region. For example, in 2002, WAPA supplied approximately 1.8 million MW of firm power and energy to Nebraska entities alone (approximately 7% of the total energy sold in Nebraska for the year), resulting in $32.8 million in federal revenue. *See* NPA Report at 15. On a broader scale, hydropower benefits produced on the Missouri River total more than $615 million annually. NAS Report at 97. Of that benefit, Nebraska receives 27.3%, or approximately $168 million. *Id.*

Simply put, hydropower is generated by the flow of water out of the upstream dams through turbines, which generates electricity. To the extent water is retained upstream in Lake Sakakawea, it is not being released to generate hydroelectricity or revenue.

III. THERMAL POWER GENERATION WOULD BE ADVERSELY IMPACTED BY THE RELIEF SOUGHT BY NORTH DAKOTA.

Twenty-five electric generating stations, including coal-fired and nuclear-fired plants, are located on the main stem of the Missouri River, from which they draw cooling water for their steam-electric generating processes. These plants have a gross electric generating capacity of 15,084 MW. Seventy-four percent of this capacity is produced by powerplants in the river reaches below Gavins Point Dam. The nuclear powerplants have a combined generating capacity of 2,556 MW. FEIS 3-113-114.

The Corps explains how low Missouri River flows adversely affect facilities reliant on Missouri River water:

"[F]low in the river and ambient water temperature affect a plant's ability to operate within [NPDES] standards." FEIS 3-114. However, "[e]ven when standards can be met, variable costs may be incurred when mainstem lake or river levels fall below the elevation required for normal intake operation. These costs include operation and maintenance (O&M), pumping, personnel, and emergency operations costs." *Id.* The FEIS explains "[l]oss of capacity could force utilities to construct additional facilities or purchase outside energy to replace the decreased capability. In some cases, cooling towers are not viable, and replacement generating capacity would need to be constructed if thermal discharge requirements would significantly curtail power generating capability." FEIS 3-114.

If thermal discharge limitations significantly curtail power generating capability at CNS, it is highly probable that all similarly situated plants on the Missouri River system would experience the same or similar circumstances. Losing this much power generation would have severe impacts on the stability and efficiency of the MAPP region as the electricity system would not be able to handle demand requirements. Although utilities might be able purchase enough power to make up for the loss, the Missouri River Basin lacks sufficient transmission capacity to import enough replacement power into the region. Power outages and voltage and power swings could result, potentially leading to lost transmission lines, and cascading outages. NPA Report at 21-22.

CONCLUSION

Enforcement of North Dakota's water quality standards would compromise not just the navigation industry, but also the larger benefits maintained by navigation flows. Although North Dakota presents the case as one of an $84.7 million recreation industry versus a $6.7 million navigation industry, the reality is quite different. When factoring in the actual benefits to North Dakota ($22 million) and the downstream benefits dependant on navigation flows ($1.3 billion), enforcing North Dakota's water quality standards would wreak havoc on the Basin's economy. NPPD appreciates the opportunity to provide the Court with a more accurate picture of the economic situation in the Basin, and respectfully requests that the Court deny the Petition for want of "compelling reasons."

Respectfully submitted,

DONALD G. BLANKENAU
THOMAS R. WILMOTH
Counsel of Record

FENNEMORE CRAIG, P.C.
206 South 13th Street, Suite 1400
Lincoln, NE 68508
(402) 323-6200
Attorneys for the
Nebraska Public Power District

(3)

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Supreme Court of the United States

STATE OF NORTH DAKOTA, et al.,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE STATES OF SOUTH DAKOTA, MONTANA, NEVADA AND SOUTH CAROLINA AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

LAWRENCE E. LONG*
Attorney General
State of South Dakota

DIANE BEST
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215

**Counsel of Record*

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

HENRY MCMASTER
Attorney General
State of South Carolina
Robert C. Dennis Office Building
P.O. Box 11549
Columbia, SC 29211-1549
(803) 724-3970

MIKE MCGRATH
Attorney General
State of Montana
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620
(406) 444-2026

GEORGE J. CHANOS
Attorney General
State of Nevada
Nevada Department of Justice
100 North Carson Street
Carson City, NV 89701
(775) 684-1112

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INTEREST OF AMICI CURIAE

Amicus State of South Dakota[1] and other State amici curiae have a legal responsibility under both federal and state law to protect our Nation's waters. Each State has received delegation from the Environmental Protection Agency (EPA) to implement the Clean Water Act (CWA) on behalf of the United States. As part of that delegation, each State has enacted its own corresponding statutes and rules enforcing water quality standards in the Nation's waters. State statutes and rules dovetail with federal water pollution control laws. State laws must, as a matter of federal law, be at least as stringent as the federal Act.

The state laws, as developed through the federal EPA process, are generally enforceable against federal facilities. 33 U.S.C. § 1323(a). The Army Corps of Engineers, the agency responsible for some of the largest dams in the United States, claims to be exempt under a broad reading of 33 U.S.C. § 1371(a).[2]

Resolving the tension between these statutes is of vital interest to the States when considering the pollution that the Corps' huge dams cause and the serious responsibility of the States to control pollution.

Amici States support the Petition for Writ of Certiorari because they share North Dakota's concern that the Eighth

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[1] South Dakota was an Intervenor before the District Court, but only participated as amicus curiae before the Eighth Circuit Court of Appeals. South Dakota is erroneously listed as a respondent in the caption to North Dakota's Petition for Certiorari.

[2] Although the Army Corps of Engineers broadly claims to be exempt, its planning personnel purport to have examined state water quality standards for each of the relevant states and tribes. Most recently, an extensive 15-year water planning effort by the Corps was distilled into nine volumes. *Final Environmental Impact Statement, Master Water Control Manual Missouri River* (Mar. 2004). A full volume was devoted to state and tribal water quality standards. *Id.*, Volume V: Appendix B. The Corps apparently accepts the water quality standards as an arguably important part of its study in planning efforts, but has chosen to take the position that such standards are not applicable.

Circuit's view of broad preemption undermines the important responsibility of the States to implement the CWA.

SUMMARY OF ARGUMENT

The Corps controls the dams for three out of the five largest reservoirs in the United States.[3] They are Missouri River reservoirs, part of "an integrated system providing for flood control, navigation, irrigation, hydropower, water supply, water quality, recreation, and fish and wildlife" on the Missouri.[4] These reservoirs are only part of the Army Corps of Engineers' vast holdings.[5] Many of its installations are multipurpose facilities like the Missouri River reservoirs that have some navigation component, but other facets as well.

Notwithstanding the multiple purposes of the Corps dams, the Eighth Circuit Court of Appeals has held that the Corps is not required to comply with state water quality standards under the CWA because navigation is "affected." The decision broadly construed a statutory navigation exemption:

> The CWA's preservation of sovereign immunity where the Corps' authority to maintain navigation would be affected and the principles of preemption preclude the enforcement of North Dakota's state water quality standards against the Corps' releases of water from Lake Sakakawea.

In re Operation of the Missouri River System Litigation, 418 F.3d 915, 920 (8th Cir. 2005).

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[3] United States Society of Dams, http://www2.privatei.com/~uscold/uscold_s.html.

[4] March 2004, United States Army Corps of Engineers, Record of Decision, Missouri River Master Water Control Manual Review and Update, http://www.nwd-mr.usace.army.mil/rcc/reports/pdfs/recordofdecision.pdf.

[5] http://www.usace.army.mil/commander.html.

Yet, the exemption is, by its terms, only applicable when compliance with the CWA actually affects or impairs navigation.[6]

The Eighth Circuit's expansive interpretation of the navigation exemption is unwarranted and concerns not only Corps operations on the Missouri River, but also a large number of other Corps operations nationwide.

Indeed, the CWA itself warrants a broad interpretation with narrowly drawn exceptions. The CWA is intended to be comprehensive. Its stated objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA establishes a national goal of attaining, wherever possible, "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(2). To achieve this goal, the CWA requires each State to establish and implement water quality standards. *See* 33 U.S.C. §§ 1313(a) & (c)(2)(A). Water quality standards are to protect the public health or welfare, enhance the

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[6] All federal agencies (including Bureau of Reclamation, the entity that operates the largest dams of all) must abide by the Act, but a limited exemption applies if the authority of the Secretary of the Army to conduct navigation is affected or impaired:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity. . . .

33 U.S.C. § 1323(a); and:

> This chapter shall not be construed as . . . (2) affecting or impairing the authority of the Secretary of the Army (a) to maintain navigation or. . . .

33 U.S.C. § 1371(a).

quality of water, and serve the purposes of the CWA. 40 C.F.R. § 131.3(i); 33 U.S.C. § 1313(c)(1).

The Amici assert that the navigation exception to the CWA should be narrowly construed, especially when considering the purpose and intent of the CWA and the burden that the CWA places on the States to control and abate pollution.

Ultimately, through the application of the CWA, States are making real progress in protecting and restoring the biological, physical, and chemical integrity of the Nation's waters impacted by dam pollution. States will be unable to fulfill their congressional mandate to protect water quality in the absence of authority to enforce the EPA-approved water quality standards. States must have the authority to enforce water quality standards on the large federal facilities maintained by the Corps, particularly when the Corps has not shown that such enforcement will actually significantly impair or affect navigation.

ARGUMENT

The Eighth Circuit held that any claim or invocation of navigation by the Corps will supersede the Corps' responsibility to abide by the CWA. In doing so, the Eighth Circuit failed to require the Corps to demonstrate an actual significant affect on navigation as should be required before granting an exemption from the CWA.

The Clean Water Act is comprehensive and applies to all "waters of the United States."[7] It delegates much of the

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[7] The Court has also recently granted certiorari in two cases that are different from the issue here but deal with the scope of "waters of the United States" in light of *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004), *reh'g en banc denied*, (Nov. 2, 2004), *cert. granted*, 126 S.Ct. 414, 163 L.Ed.2d 316, 73 U.S.L.W. 3466 (U.S. Oct. 11, 2005) (No. 04-1034); *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004), *cert. granted*, 126 S.Ct. 415, 163 L.Ed.2d 316, 73 U.S.L.W. 3632 (U.S. Oct. 11, 2005) (No. 04-1384).

(Continued on following page)

Nation's pollution control responsibility to the States. The policy objective is "to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution." 33 U.S.C. § 1251(b). Under the Act, "pollution" is defined as encompassing all human activities that alter the chemical, physical, and biological integrity of water. 33 U.S.C. § 1362(19). Consistent with this definition and in order to achieve the Act's ambitious policy, Congress authorized States to protect and restore beneficial uses of rivers and streams through the adoption and achievement of water quality standards. 33 U.S.C. § 1313. These standards are a powerful tool for combating pollution because they include not only numerical criteria, but designated uses adopted pursuant to the Act's goal to provide for "the protection and propagation of fish, shellfish and wildlife" and "for recreation in and on the water." 33 U.S.C. § 1251(a)(2). Protection of these uses is at the core of the Act's purpose and goals. *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 716-719 (1994) (*PUD No. 1*).

Although the CWA is designed for comprehensive protection of the Nation's waters, the Corps, operator of some of the largest dams in the United States, holds a limited exemption for navigation. The exemption has been interpreted too broadly by the Eighth Circuit Court of Appeals.

Those disputes address the scope of the terms "waters of the United States" and "navigable waters," terms used throughout the CWA. Petitioners argue in those cases that the terms are used in the CWA to limit the scope of CWA to only larger "federal" waters. It is noteworthy that even former EPA administrators who support an expansive federal role assert that State responsibilities are part of a cohesive state/federal regulatory effort over all "waters of the United States." *See* Amicus Brief of Former EPA Administrators, 2006 WL 13920. The present matter creates an additional dynamic. The Eighth Circuit Court of Appeals held that the Army Corps of Engineers was entitled to escape water quality regulations because such regulation could "affect navigation," even though an alternative to correct the water quality problem would exist that would not affect navigation. If the Eighth Circuit's broad interpretation is allowed to stand, Corps use of any "navigable" waterway would arguably evade state regulation under the CWA.

I. THE ARMY CORPS OF ENGINEERS OPERATES MANY LARGE DAMS.

The federal government operates the dams with the largest reservoirs in the United States.[8] The two largest man-made reservoirs are Lake Mead (Hoover Dam) and Lake Powell (Glen Canyon Dam) operated by the Bureau of Reclamation. *Id.* The next three are part of the Missouri River main stem system operated by the Army Corps of Engineers. Lake Oahe (Oahe Dam) and Lake Sakakawea (Garrison Dam) in North and South Dakota are the third and fourth largest reservoirs. *Id.* The fifth largest is Fort Peck Lake in Montana.

These three Corps dams on the Missouri River are, along with three other large Corps dams in South Dakota, operated as multipurpose projects. The Corps' Missouri River holdings are "an integrated system providing for flood control, navigation, irrigation, hydropower, water supply, water quality, recreation, and fish and wildlife." March 2004, Record of Decision, Missouri River Master Water Control Manual Review and Update, http://www.nwd-mr.usace.army.mil/rcc/reports/pdfs/recordofdecision.pdf.

The Missouri River reservoirs are only part of the Corps' holdings. The Corps "has built an intracoastal and inland network of 12,000 miles of commercial navigation channels and over 200 locks and dams for navigation purposes."[9] The Corps operates 368 reservoirs for flood control. *Id.* Many of these installations are multipurpose facilities. The Corps operates 75 hydropower plants and is the "largest operator of hydroelectric power plants in the United States." http://www.corpsresults.us/pdfs/hydropower.pdf.

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[8] United States Society of Dams, http://www2.privatei.com/~uscold/uscold_s.html.

[9] http://www.usace.army.mil/commander.html.

II. DAMS, PARTICULARLY HYDROPOWER DAMS, PRESENT SERIOUS WATER QUALITY PROBLEMS.

There are abundant scientific studies on the variety of water quality impacts arising from impoundment of water behind dams and operation of hydroelectric facilities.[10] The type and degree of impact varies depending upon the size and type of dam, its manner of operation, and the nature of the river or stream system.[11]

When free-flowing rivers are impounded behind hydropower dams, they often stratify into layers of warmer waters on top and colder, oxygen-deprived waters below, with neither temperature reflecting the natural condition of the river system.[12] The water temperature and quantity of dissolved oxygen can violate water quality standards. Violation of water quality standards is no mere technical concern. Temperature deviations alone can affect the mortality of fish and change the population of fish species above and below the dams. Further, the amount of oxygen in the water column can have a dramatic impact on the kinds of organisms that can survive below the dam.[13] Varying temperatures and oxygen levels in the reservoir also affect the water chemistry of the entire system and can cause

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[10] *See*, for example, the references listed by the U.S. Environmental Protection Agency in EPA's Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters, Chapter 6, Section VI.B., *available at* http://www.epa.gov/nps/MMGI/Chapter6/ch6-6.html.

[11] *See generally* Collier, M., R.H. Webb and J.C. Schmidt, *U.S. Geological Survey, Dams and Rivers: Primer on the Downstream Effects of Dams*, USGS Circular 1126 (1996), *available at* http://pubs.er.usgs.gov/pubs/cir/cir1126 (describing the effect of temperature on fish below the Flaming Gorge dam on the Green River) (*USGS Primer*).

[12] Peterson, M.J. et al., *U.S. Department of Energy, Regulatory Approaches for Addressing Dissolved Oxygen Concerns at Hydropower Facilities*, DOE/ID-11071 (Mar. 2003) at 1-5, *available at* http://hydropower.id.doe.gov/turbines/pdfs/doeid-11071; *USGS Primer*, at 58.

[13] *Id.*

toxic chemicals such as hydrogen sulfide and ammonia to be released in harmful concentrations.[14]

Another water chemistry impact of hydropower dams is the entrainment or supersaturation of atmospheric gases, including nitrogen, as water is spilled over high dams. These gases are taken into the circulatory systems of fish. As the fish move to different levels of the river, the gases come out of solution, forming bubbles that can cause a potentially lethal effect similar to the "bends" in scuba divers.[15]

Also, evaporation and runoff into reservoirs affects reservoir water quality by increasing salinity.[16]

Dams cause changes in water movement and may result in increased suspension and deposition of soil in reservoirs. Again, this is no mere technicality. Impoundment of soil-laden water in reservoirs may result in changes to the flow regimes of rivers with significant impacts to downstream aquatic ecosystems.[17] In some river systems, the releases from dams of low sediment water may cause channel incision, changing riverbed composition and riparian habitat.[18] Although effects vary depending on the dam, sediment will build up behind dams and/or cause major impacts on downstream estuaries and wetlands.[19]

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[14] *Regulatory Approaches*, at 1.

[15] National Research Council, National Academy of Sciences, *Upstream: Salmon and Society in the Pacific Northwest* (1996), at 229, *available at* http://books.nap.edu/books/0309053250/html/index.html (*Upstream*); Abernathy, C.S., B.G. Amidan, U.S. Department of Energy, *Laboratory Studies of the Effects of Pressure and Dissolved Gas Supersaturation on Turbine-Passed Fish*, DOE/ID-10853 (Mar. 2001) at 2.3-2.5, *available at* http://hydropower.id.doe.gov/turbines/pdfs/doeid-10853.pdf.

[16] *USGS Primer*, at 43.

[17] *See USGS Primer*, generally.

[18] *USGS Primer*, at 38-45 (heavy downstream erosion of the Chattahoochee River below Buford Dam as a result of dam releases).

[19] *Upstream*, at 234-35 (noting the loss of over 20,000 acres of tidal swamps, 10,000 acres of tidal marshes, and 3,000 acres of tidal flats in

(Continued on following page)

Collectively, the water quality harm attributable to dams, and in particular, hydropower dams, covers the full range of water quality impacts that the Act defines as "pollution." It was this range of impacts that Congress authorized States to address.

While the Corps operates hydropower dams, it also claims to be exempt from the CWA because nagivation is involved. The Corps dams operate for multiple purposes and ought to be regulated according to the actual type of project use.

A. Federal and State Agencies Have Concluded That Dams Cause Water Pollution.

1. Environmental Protection Agency and State Water Pollution Control Agencies.

The EPA and State water pollution control agencies have repeatedly evaluated the impacts of dams and determined that dams impact water quality.

In 1972 Congress directed EPA to develop guidelines and methods to control pollution from "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams." 33 U.S.C. § 1314(f)(1) & (2) part (F). In response, EPA published *The Control of Pollution Caused By Hydrographic Modifications* (1973). EPA described water quality problems caused by dams including lowered dissolved oxygen levels and other impacts. *Id.*

Again, in 1987 Congress required EPA to conduct a study of the water quality impacts of dams. Pub. L. No. 100-4, Title V, § 524, 101 Stat. 89 (1987). EPA provided an updated account of the adverse water quality impacts from stratification of impounded water including "low hypolimnetic dissolved oxygen, increased iron and manganese, eutrophication,

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the past century from the Columbia River estuary as a result of the accumulation of sediment behind dams).

hydrogen sulfide, sediment movement, flow regulation, thermal changes, and reaeration denial." U.S. Environmental Protection Agency, *Report to Congress: Dam Water Quality Study*, EPA 506/2-89/002 (Mar. 1989) at v. EPA concludes that "[i]mpoundments can modify the physical, chemical, and biological characteristics of the free-flowing aquatic ecosystem." *Id.* at VII-2.

States report similar results. State agencies are required to submit plans to the EPA to address "Total Maximum Daily Loads" (TMDLs). In these reports, States evaluate sources and levels of pollution in water quality impaired waters. 33 U.S.C. § 1313(d). The reports analyze all waters, including streams with hydroelectric dams.

A recent TMDL report in the State of Washington concludes that seasonal violations of the water quality standard for dissolved gas are directly attributable to hydroelectric projects.[20] In a related TMDL report, hydropower has been identified as the major cause of water temperature standard violations in the Columbia/Snake River basin.[21]

The EPA has reviewed data from the States of New Hampshire and Maine and determined that the "presence of many dams" is a major cause of water quality impairment (particularly dissolved oxygen) in the Salmon Falls River watershed.[22] The EPA notes its approval of Maine's conclusion that changes to dam operations are necessary

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[20] U.S. Environmental Protection Agency, Washington Department of Ecology and Spokane Tribe of Indians, *Total Maximum Daily Load for Total Dissolved Gas in the Mid-Columbia River and Lake Roosevelt* (June 2004) at x-xi, *available at* http://www.ecy.wa.gov/pubs/0403002.pdf.

[21] U.S. Environmental Protection Agency, EPA Region 10 Fact Sheet No. 6, Columbia/Snake River Problem Assessment for Temperature, Fall 2001, *available at* http://yosemite.epa.gov/R10/WATER.NSF/ 840a5de5d0a8d1418825650f00715a27/15ef780a7691edef88256ae800797e05/$FILE/ATT1EWLU/col-snake%20TMDL%20Fact%20Sheet%20%236.pdf.

[22] U.S. Environmental Protection Agency, Letter Notification of Approval of Salmon Falls River TMDLs, November 22, 1999, at 6, *available at* http://www.epa.gov/region1/eco/tmdl/ssets/pdfs/me/salmonfallsriver.pdf.

in order to achieve water quality standards for dissolved oxygen.[23]

B. Federal and State Courts Have Concluded That Dams Cause Water Pollution.

This Court's decision in *PUD No. 1* recognizes the impacts of dams on water quality. That case addressed a hydropower dam proposed by a city and local utility district. The Court noted that a "sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery." *Id.* at 719. The Court described Congress's "broad conception of pollution" as evincing a concern with the "physical and biological integrity of water." *Id.* Further, the Court cited Section 304(f) of the Act, 33 U.S.C. § 1314(f), as an express recognition by Congress that "water 'pollution' may result from 'changes in the movement, flow, or circulation of any navigable waters . . . including changes caused by the construction of dams.'" *Id.* at 720.

Also, after reviewing considerable evidence and scientific testimony in *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 161 (D.C. Cir. 1982), the court of appeals concluded that dams "cause a variety of interrelated water quality problems." While dealing with a different CWA issue, the *Gorsuch* decision provides a thorough description of the water quality impacts of dams. The D.C. Circuit summarized impacts including: (1) low dissolved oxygen; (2) dissolved minerals and nutrients; (3) temperature changes; (4) sediment; (5) supersaturation (dissolved gas); and (6) a variety of other water quality impacts including indirect negative impacts on groundwater and reductions in stream flow and waste assimilation capacity. 693 F.2d at 161-164.[24]

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[23] *Id.* at 7, 15.

[24] The *Gorsuch* case dealt with an issue not presented in this case: whether dams require a permit under 33 U.S.C. § 1342. In *Gorsuch*, the D.C. Circuit deferred to EPA's decision not to require such a permit but expressly left open the question of whether water pollution from the dams could be addressed by states. 693 F.2d at 182-183.

Consistent with *Gorsuch*, other circuits have at least implicitly acknowledged the water quality impact of dams. *See, e.g., State of Missouri ex rel. Ashcroft v. Department of the Army*, 672 F.2d 1297, 1304 (8th Cir. 1982) (not questioning that the operation of the dam caused soil erosion and reduction of oxygen); *United States ex rel. Tennessee Valley Authority v. Tennessee Water Quality Control Board*, 717 F.2d 992, 1000 (6th Cir. 1983) (acknowledging that dams might be subject to state or local regulation as nonpoint sources of pollution); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 586 (6th Cir. 1988) (noting that "any resulting pollution in the form of entrained fish is, as in *Gorsuch*, an inherent result of dam operation").

C. The Corps Does Not Dispute That Its Dams Violate Water Quality Standards and Affect Fisheries.

The hydropower facilities at issue in this proceeding have violated water quality standards in North Dakota. Those standards provide that Lake Sakakawea is a "cold water fishery" requiring the water to support the growth of salmonid fishes and associated water life. *In re Operation of the Missouri River System Litigation*, 418 F.3d at 917. In 2002, Sakakawea suffered from a loss of 90 percent of its smelt biomass due to a decline in cold water habitat. Affidavit of Jeffrey Hendrickson, App. 3. Smelt are forage fish for walleye and other game fish. *Id.* Recognizing that further reductions of cold-water habitat would decimate fisheries on Sakakawea, North Dakota filed suit in 2003. Petitioner's App. 23. North Dakota asserted that reductions of the volume of cold-water habitat in the lake would violate water quality standards and would continue to impair a viable cold-water fishery system. *Id.*; *see also* Affidavit of Mike Sauer, Petitioner's App. 141-155.

In response, the Corps acknowledged that its then-existing operational manual was designed in such a way as to affect the water quality standards and the cold-water fisheries: "it is reasonable to believe that under the Master Manual criteria, that the cold-water fishery volume would

go to zero." Preliminary Injunction Testimony of Lawrence Cieslik, Chief of Operations for the Missouri River, App. 8. The Corps has since revised its operating manual in other ways, but is not willing to accommodate or comply with State water quality standards.

The Corps also recognizes that dissolved oxygen and water quality problems have occurred below Corps dams in southeastern States and that dams cause adverse water quality effects. http://www.corpsresults.us/pdfs/hydropower.pdf. Yet, the Corps (the biggest hydropower producer in the Nation) claims to be exempt from water quality standards if any navigation occurs on the stream whatsoever.

III. THE CLEAN WATER ACT AUTHORIZES STATES TO PROTECT WATER FROM POLLUTION BY DAMS.

A. The CWA Was Intended To Be Comprehensive.

The objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In order to achieve these ends, the Act has two complementary systems. One system is the prohibition of discharges of pollutants. This system is the National Pollution Discharge Elimination System, or NPDES, which requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters. 33 U.S.C. § 1342. This system is not at issue in this case.

The other system, and the one relevant to the case before this Court, is the system of water quality standards. The CWA establishes a national goal of attaining, wherever possible, "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(2). The CWA requires each State to establish and implement water quality standards. *See* 33 U.S.C. §§ 1313(a) & (c)(2)(A). Water quality standards protect the public health or welfare, enhance the quality of water and serve the

purposes of the Act. 40 C.F.R. § 131.3(i). Their purpose is expressed in federal regulation as:

> A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses. States adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act (the Act). "Serve the purposes of the Act" (as defined in sections 101(a)(2) and 303(c) of the Act) means that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation.
>
> Such standards serve the dual purposes of establishing the water quality goals for a specific water body and serve as the regulatory basis for the establishment of water-quality-based treatment controls and strategies beyond the technology-based levels of treatment required by sections 301(b) and 306 of the Act.

40 C.F.R. § 131.2.

State water quality standards must contain several distinct elements. 40 C.F.R. § 131.6. The State must establish "designated uses" of the State's waters, such as fishing, swimming, and/or protection of aquatic life. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.6(a). The State must develop specific water quality "criteria" based on scientific rationale that are designed to preserve and protect the designated uses. 40 C.F.R. §§ 131.6(a), 131.11(a)(1). Water quality criteria may be expressed in numeric terms or in narrative terms (such as, "temperature must be less than or equal to 65 degrees Fahrenheit" or "waters shall be free of visible garbage," respectively). The State must develop

an "antidegradation" policy designed to prevent water quality from deteriorating. 40 C.F.R. §§ 131.6(d), 131.12. Each State's water quality standards must be evaluated and revised to protect designated uses at least every three years. 33 U.S.C. § 1313(c)(1).[28]

The CWA further requires that States identify and submit plans for recovering any river or stream segments that are not meeting water quality criteria. 33 U.S.C. § 1313(d). Subsection (d) requires States to account for all of the sources of pollution in any such impaired waters through TMDLs, and subsection (e) requires States to develop plans for addressing those sources. 33 U.S.C. § 1313(d). To develop effective plans, States must have authority to address sources of pollution including the water quality impacts of hydropower dams.

By providing for State regulation of water quality standards and through State TMDL planning, Congress assigned the States significant pollution control authority. Indeed, Congress not only recognized the "responsibilities and rights of States to prevent, reduce and eliminate pollution," it stated that federal policy is to support State efforts through research, technical services and financial aid. 33 U.S.C. § 1251(b); 33 U.S.C. § 1256(a) (authorizing grants to States "for the prevention, reduction, and elimination of pollution"); 33 U.S.C. § 1370 (requiring that State requirements be at least as stringent as the federal standard); and 33 U.S.C. § 1323 (requiring federal agencies to meet State requirements for the "control and abatement of water pollution").

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[28] An example of EPA-approved water quality standards is ARSD ch. 74:51, South Dakota's standards. http://www.legis.state.sd.us/rules/DisplayRule.aspx?Rule=74:51:01. These standards include the many EPA-required provisions, including classification of waters. ARSD 74:51:03:05 and ARSD 74:51:03:02(2) classify Missouri River reservoirs as "coldwater permanent fish propagation waters." This standard is similar to the one used in North Dakota for the upstream reach of the Missouri River at issue in the proceeding below.

Recognizing State authority to enforce water quality standards is essential to fulfilling the goals of the CWA: the protection of the full array of uses by the public, including recreation in and on the water and the propagation of fish, shellfish, and wildlife. 33 U.S.C. § 1251(a)(2); 40 C.F.R. § 131.10. With the Act's heavy emphasis on controlling "pollution," it would be remarkable if Congress had intended to generally exempt a major source of pollution such as dams operated by the Corps from State water quality standards enforcement.

In *PUD No. 1*, this Court recognized that although water bodies are protected from pollution by discharge permits containing specific requirements for specific types of effluent, water quality standards are important because they measure the health of the stream itself and are a fallback for determining whether the water is becoming polluted. *Id.* at 704. The Court held that the "state water quality standards provide a 'supplementary basis ... so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.'" *Id.* at 704 (citing *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 n.12 (1976)). This fallback or safeguard role is critically important in situations where federal facilities (like Corps' reservoirs) do not hold specific discharge permits for specific types of effluent.

Against this background, the specific issue here is the tension in the CWA between a requirement that the federal agencies must abide by the Act (33 U.S.C. § 1323(a)) and a more limited exemption for navigation. 33 U.S.C. § 1371(a).

The decision of the Eighth Circuit resolved that tension as follows:

> The CWA's preservation of sovereign immunity where the Corps' authority to maintain navigation would be affected and the principles of preemption preclude the enforcement of North Dakota's state water quality standards against the Corps' releases of water from Lake Sakakawea.

In re Operation of the Missouri River System Litigation, 418 F.3d at 920.

Limiting State authority by exempting all federal dams (including hydropower dams) operated by the Corps whenever the Corps merely asserts navigation is affected (as the Eighth Circuit has done) would remove an important tool from the CWA and would prevent States from protecting the broad array of uses designated in State water quality standards for the rivers and streams.

B. Based on Legislative History, the CWA Was Intended to Include Comprehensive Regulation of Federal Facilities.

The congressional history also makes it apparent that the Congress intended to include federal facilities in several facets of CWA regulation. In 1977 Congress amended the CWA, thereby producing a sea change in the way that federal facilities are to be viewed under the CWA. As one example, States obtained authority to impose qualifications on federal permits in 1977. Previously, State authority to impose State conditions on federal permits ("401 conditions") was limited to federal permits issued to nonfederal entities. Pub. L. No. 92-500, § 401. The States were constrained by a provision in the CWA that prohibited States from imposing such conditions on federal licenses if an agency of the federal government was itself the permit applicant. It stated that "no Federal agency shall be deemed to be an applicant for the purposes of this subsection." Pub. L. No. 92-500, § 401(a)(6), App. 12. Importantly, in 1977 the federal exemption was repealed in Pub. L. No. 95-217, § 61(b), App. 16. Due to the 1977 repeal, a federal agency is now subject to State qualifications when that agency obtains a federal license.[25]

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[25] This applies, of course, only to situations where federal permits are actually required. Here, the federal hydropower plants involved are not subject to FERC permitting and 401 qualifications are not imposed on such operations for that reason. In other words, the water quality standards cannot be enforced under the heavy hammer imposed by FERC permitting. Still, that situation is caused by FERC authorization,

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The 1977 amendments also make it clear that Congress intended States to use Section 401 authority to prohibit not only actual pollution events (Section 301) but also to enforce State water quality standards (Section 303). Pub. L. No. 95-217, § 64, App. 16. Thus, Congress expressly included State water quality standards in the group of laws that are enforceable by States as qualifications on federal permits. *Id.* Indeed, the general inclusion of water quality standards in Section 401 permitting (and not just State control over discharges of pollutants) is an issue being considered by this Court.[27] *S.D. Warren Company v. Board of Environmental Protection*, 2005 Me. 27, 868 A.2d 210, *cert. granted in part*, 126 S.Ct. 415, 163 L.Ed.2d 316 (U.S. Oct. 11, 2005) (No. 04-1527).

Moreover, the 1977 amendments waived federal sovereign immunity violations of the CWA by any federal agency. Pub. L. No. 95-217, § 61(a), App. 14-16. While the Congress could have restricted the waiver to particular provisions of the CWA (such as, for example, Section 401), it did not do so. The waiver is applied to direct enforcement against federal facilities, not just for the "401" situation addressed above.

As seen, when Congress enacted the 1977 amendments to the CWA, it linked the explicit waiver of federal immunity from State water quality standard enforcement (adding water quality standards to Section 313 when it stated, "This subsection shall apply notwithstanding any immunity of such agencies . . . under any law or rule of law.") with the removal of the exemption of federal agencies from Section 401 licensing requirements. *See* Pub. L. No. 95-217, § 61(a).

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not the CWA. *Uncompahgre Valley Water Users Ass'n v. F.E.R.C.*, 785 F.2d 269, 274 (10th Cir. 1986). Indeed, the lack of FERC licensing and relicensing (and corresponding lack of 401 consideration) demonstrate that it is all the more important that states take federal agencies directly to task in federal court since they cannot rely on FERC to enforce the CWA when it comes to hydropower facilities.

[27] *S.D. Warren* is a nonfederal facility; the issue therefore arises in the context of an FERC proceeding.

C. States Can Make Real Improvements in Water Quality by Addressing the Pollution From Dams.

The issue presented is not theoretical. States can make real improvements to water quality through regulating dams. The EPA concluded, in its 1989 report to Congress, that impacts can be mitigated through a mix of physical and operational measures and structural changes to dams. The EPA suggests a range of measures that can be taken, ranging from selective withdrawal of reservoir water, to changes in the flow regime, to altering the structure of the dam to change the depth or manner of withdrawal. Report to Congress: *Dam Water Quality Study*, at v-vi.

Further support for the idea that States can make a difference through the regulation of dams can be found in the *USGS Primer* on dams in which USGS concludes that the negative ecological impacts of dams can be better managed through the use of scientific knowledge. *USGS Primer*, at 1-9.

The United States Department of Energy suggests that, after adequate study, a "combination of mitigation techniques, including structural, operational, and regulatory approaches" may be the most effective way to address dissolved oxygen problems at hydropower plants. *Regulatory Approaches*, DOE at 22, 23. *See also* Hayes, D.F. et al., *Enhancing Water Quality In Hydropower System Operations*, 34(3) Water Resources Research, at 471-483 (Mar. 1998) (concluding that operational changes in dam projects can increase dissolved oxygen levels without substantially impacting project purposes).

EPA and State water pollution control agencies are increasingly seeking to evaluate the potential for improving water quality through innovative regulation of dams. Researchers have compiled a list of fifty-five hydropower projects in the Mississippi River basin associated with water quality impaired waters. John Crossman and Associates, *Evaluation of Hydropower Projects and Identification of Potential Opportunities for Pollutant Trading* (2001), *available at*

http://www.epa.gov/msbasin/pdf/hydropower_final.pdf. This report, prepared on behalf of EPA, concluded that:

> [T]hese projects have the potential to make a significant contribution to national water quality objectives if technological advances to improve water quality in reservoirs, downstream tailwaters, and hydro-turbine releases are employed in a watershed based trading program.

Id. at 1.

By using the State water quality standards as approved by the EPA, States can lead dam operators to make meaningful improvements in water quality. Congress clearly intended that States have this authority, and promised in the CWA that government would use its authority to prevent, reduce, and eliminate pollution. States must have authority to enforce water quality standards over facilities operated by the Corps in order to fulfill this promise. Further, Congress did not intend that the mere potential to affect navigation, however insignificant, would strip States of such authority.

CONCLUSION

The Court should grant North Dakota's petition for certiorari.

Respectfully submitted,

LAWRENCE E. LONG*
Attorney General
State of South Dakota

DIANE BEST
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215

**Counsel of Record*

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF MCLEAN	SOUTH CENTRAL JUDICIAL DISTRICT
State of North Dakota through the North Dakota Department of Health, an Agency of the State of North Dakota, John Hoeven, Governor, and Wayne Stenehjem, North Dakota Attorney General, ex rel. State of North Dakota, Plaintiffs, v. The United States Army Corps of Engineers, a Federal Agency, and General David A. Fastabend, Commander, NW Division, Portland, Oregon, United States Army Corps of Engineers, and LT. Colonel Kurt F. Ubbelohde, District Engineer, Omaha District. Defendants.	**AFFIDAVIT OF JEFFREY HENDRICKSON** **CIVIL NO**

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

Jeffrey Hendrickson, being duly sworn, states under oath:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am employed by the North Dakota Game and Fish Department as the Central Fisheries District Supervisor. I conduct and oversee fisheries management and research in Central North Dakota, including the Missouri River System. I am a member of the American Fisheries Society (National), the Dakota Chapter of the American Fisheries Society, and represent North Dakota on the Walleye Technical Committee of the North Central Division of the American Fisheries Society. I have conducted fisheries research and management activities on the Missouri River System since January, 1991. I have authored or co-authored numerous internal reports and one peer reviewed paper regarding all aspects of fisheries research and management on Lakes Sakakawea and Oahe, and the Yellowstone and Missouri rivers. For the past twelve years, I've contributed fisheries information and recommendations to the Missouri River Natural Resources Committee (MRNRC).

3. Lake Sakakawea is North Dakota's number one fishery, accounting for approximately 2 million angler hours of fishing and more than $23 million of angler expenditures annually. Approximately 98% of anglers fishing Lake Sakakawea target walleye or salmon.

4. The smelt population in Lake Sakakawea is very important to the health of the sport fishery and regional economy and the collapse of this critical forage base can have devastating effects. Though a serious collapse of the smelt population has not been observed in Lake Sakakawea, the impacts of a crash have been observed in the next downstream reservoir, Lake Oahe. Driven by the smelt population collapse during the mid to late 1990s, fishing effort in Lake Oahe, South Dakota decreased 68%

in the subsequent years resulting in a reduction in angler expenditures of $16 million.

5. Lake Sakakawea's fishery shows evidence of stress when the late summer volume of coldwater habitat falls below 800,000 acre-feet (generally around an elevation of 1830 feet mean sea level). This stress is caused by shrinking coldwater habitat and is manifested in the fishery through poor growth and condition of walleye and chinook salmon as well as other gamefish. There was a 90% decline in Lake Sakakawea's smelt biomass estimate from 2001 to 2002. Late summer coldwater habitat decreased from slightly more than 800,000 acre-feet in 2001 to less than 200,000 acre-feet in 2002. This has resulted in a substantial reduction in the condition of walleye and other sport fish in Lake Sakakawea.

6. When the volume of coldwater habitat in late summer falls below 200,000 acre-feet (approximately 1825 feet mean sea level), the likelihood of a smelt dieoff increases dramatically. A smelt dieoff occurred in Lake Sakakawea in late summer 1990, when the coldwater habitat was estimated at less than 100,000 acre-feet (1821 feet mean sea level).

7. Prior to the introduction of smelt as a forage fish, the condition and growth of walleye was very poor in Lake Sakakawea, resulting in high natural mortality and low abundances of walleye. Since smelt became well established by 1978, they have composed the vast majority of forage for walleye in Lake Sakakawea. Condition and growth improved, and natural mortality decreased, resulting in Lake Sakakawea becoming one of the premier walleye fisheries in the United States. The fishery is well known for both the size of walleye caught as well as the

numbers of walleye caught. As this fishery has evolved, so has its desirability. The number of walleye fishing tournaments doubled from the mid 1980's to 2001. The number of tournaments decreased to 20 in 2002 due to low water levels.

8. The following is an example of how smelt abundance supports the walleye fishery in Lake Sakakawea. Low water levels and limited coldwater habitat in 1990 caused a smelt die-off. Anglers harvested 0.9 pounds of walleye per angler-day from Lake Sakakawea in 1991 and 1994. The smelt population began to rebound after water levels and coldwater habitat increased in 1994. After a few years of abundant coldwater habitat and good smelt natural reproduction, the walleye harvest improved substantially to 2.7 pounds/angler-day in 1997 and 3.5 pounds/day in 2000. Angler use was also reduced by 25% during the low water year in 1991.

9. The condition of walleye in Lake Sakakawea has been declining since 2000 due to the decline in the smelt population. If these declines in condition continue, natural mortality will increase for walleye. Increased natural mortality will result in lower abundance of walleye and subsequent reductions in angler use.

10. Since 1995, all of North Dakota's and some of other state's walleye eggs needed (nearly 2900 quarts) to meet stocking requests for hundreds of water bodies originated from Lake Sakakawea. Maintaining quality walleye for spring egg taking operations is critical to sustaining walleye fisheries throughout North Dakota. Presently, this is especially true as other historic lakes for walleye eggs in North Dakota have either literally dried

up (Lake Oahe, North Dakota) or have flooded out (Devils Lake).

Dated this 17th day of April, 2003.

/s/ Jeffrey Hendrickson
Jeffrey Hendrickson

Subscribed and sworn to
before me this 17 day of
April, 2003.

/s/ Jaime Pochant
Notary Public

My Commission
Expires 7-22-04

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

STATE OF NORTH DAKOTA, through the North Dakota Department of Health, an Agency of the State of North Dakota; JOHN HOEVEN, Governor; WAYNE STENEHJEM, North Dakota Attorney General, ex Rel., State of North Dakota,	)	
Plaintiffs,	)	
vs.	)	
UNITED STATES ARMY CORPS OF ENGINEERS; DAVID A. FASTABEND, General Commander, Northwest Division, Portland, Oregon, United States Army Corps of Engineers; KURT F. UBBELOHDE, Lt. Colonel, District Engineer, Omaha District.	)	CIVIL NO. A1-02-050
Defendants.	)	
STATE OF NEBRASKA,	)	
Intervenor.	)	
STATE OF SOUTH DAKOTA,	)	
Intervenor.	)	

TRANSCRIPT OF HEARING

ON MOTION FOR PRELIMINARY INJUNCTION

Taken at
United States Courthouse
Bismarck, North Dakota
June 4, 2003

BEFORE THE HONORABLE DANIEL L. HOVLAND – CHIEF JUDGE

[216] **LAWRENCE J. CIESLIK,**

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DISHEROON:

Q. State your name for the record, please, Mr. Cieslik.

A. My name is Lawrence Joseph Cieslik.

Q. And your position, please?

A. I'm the Chief of the Water Management Division for the Corps of Engineers, Northwestern Division, and my duties include the operation of the Missouri River mainstem system.

Q. How long have you held that position?

A. I've been Chief of the Water Management Division since 1997, and prior to that I was the project manager for the Master Manual review and update.

Q. And are you continuing to supervise the preparation of a new Master Manual process?

A. That is correct.

* * *

[224] Q. I want to ask you one or two questions about the Chinook fishery in Lake Sakakawea. And we have had testimony that these fisheries were – the smelt were put in by North Dakota in '71 and the Chinook in '76.

Under the Master Manual as it existed at that time, can you tell us whether or not it would have indicated difficulties at certain times with maintaining the fisheries for these two species?

A. Well, the Master Manual drought criteria as it currently stands would allow Lake Sakakawea to drop to 1775 feet above main sea level. Right now we're at 23, basically. So we're talking about 48 more feet.

Now, I'm not a fisheries expert, but looking at the data that has been presented for the cold-water fishery –

MR. WITHAM: Objection. Speculation.

THE COURT: Overruled.

MR. DISHEROON: Go ahead.

THE WITNESS: – I would assume that it's reasonable to believe that under the Master Manual [225] criteria, that the cold-water fishery volume would go to zero; sometime between where we're at now and down to 1775.

* * *

P.L. 92-500 LAWS OF 92nd CONG. - 2nd SESS. (1972)

"TITLE IV – PERMITS AND LICENSES

"CERTIFICATION

"Sec. 401.(a)(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 301, 302, 306, and 307 of this Act. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 301(b) and 302, and there is not an applicable standard under sections 306 and 307, the State shall so certify, except that any such certification shall not be deemed to satisfy section 511(c) of this Act. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect

to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

"(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions

cannot insure such compliance such agency shall not issue such license or permit.

"(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 301, 302, 306, and 307 of this Act because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 301, 302, 306, or 307 of this Act.

"(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with

respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 301, 302, 306, or 307 of this Act.

"(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this Act that such facility or activity has been operated in violation of the applicable provisions of section 301, 302, 306, or 307 of this Act.

"(6) No Federal agency shall be deemed to be an applicant for the purposes of this subsection.

"(7) Except with respect to a permit issued under section 402 of this Act, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

"(b) Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

"(c) In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use.

Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

"(d) Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this Act, standard of performance under section 306 of this Act, or prohibition, effluent standard, or pretreatment standard under section 307 of this Act, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

* * *

Pub. L. No. 95-217, 95th Cong., 1st Sess. (1977)

FEDERAL FACILITY COMPLIANCE

SEC. 61. (a) Subsection (a) of section 313 of the Federal Water Pollution Control Act is amended (*1*) by striking in the first sentence thereof the words "shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges." and inserting in lieu thereof a comma and the words "and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water

pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer, agent, or employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with 28 U.S.C. 1441 et seq. No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court."; and (2) by adding at the end of such subsection the following: "In addition to any such exemption of a particular effluent source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vessels, vehicles, or other

classes or categories of property, and access to such property, which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature. The President shall reconsider the need for such regulations at three-year intervals."

(b) Section 401(a) of the Federal Water Pollution Control Act is amended by striking paragraph (6) and renumbering and succeeding paragraph accordingly.

COMPLIANCE WITH STATE REQUIREMENTS

SEC. 64. Section 401 of the Federal Water Pollution Control Act is amended by inserting "303," after "302," in the phrase "sections 301, 302, 306, and 307 of this Act", and in the phrase "section 301, 302, 306, or 307 of this Act", each time these phrases appear.